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Supreme Court, U.S.
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No: 95-65 JUL 14 1995

In The Supreme Court of the United States

October Term 1995

JAMES L. HOOPER, M.D., et al.,
Petitioners,

v.

PERRINO, DOLINSKY, KARESH, WITHROW, JUARBE & BAIER, M.D., P.A., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

William A. Beeton, Jr.
Counsel of Record for Petitioners
Allen H. Sachsel
Of Counsel for Petitioners
10521 Judicial Drive
Suite 307
Fairfax, Virginia 22030
(703) 385-9400

LIBERTY LEGAL SERVICES
1111 East Main Street ♦ Richmond, VA 23219 ♦ (804) 643-6054

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QUESTIONS PRESENTED

1. Whether a plaintiff in an Age Discrimination in Employment case who has adduced as evidence a statement of age animus specifically referring to him and related to adverse employment actions against him should survive a motion for summary judgment, especially when he also has shown other age related statements referring to him, and disparate treatment.

2. Whether the court of appeals misinterpreted or misapplied the abuse of discretion standard of review in an appeal from a district court's imposition of FRCP Rule 11 sanctions of:

> (a) $5000 for signing the Second Amended Complaint and the Opposition to the Motion for Summary Judgment in this case on grounds plaintiff 's filings did not meet FRCP Rule 11 standards, and based in substantial part on the district court's "abiding conviction", unsupported by any evidence, that the case was pursued with the intent to cost the defendants as much as possible to defend; and
>
> (b) $500 for signing a motion, pursuant to FRCP Rule 54(b) and based on 28 U.S.C. 1367(c), to partially vacate the summary judgment, before entry of final judgment, on grounds the district court may improvidently have ruled on a novel issue of Maryland law after deciding to dismiss the related federal claims, especially when a Maryland state case between the same parties in which such issue could have been litigated was pending.

PARTIES

Petitioner is James L. Hooper, M.D., for Question No. 1. Allen H. Sachsel is petitioner for Question No. 2. The first named Respondent is Perrino, Dolinsky, Karesh, Withrow, Juarbe & Baier, M.D., P.A., which was known as Montgomery Medical Group, P.A., at the time this case was filed in the district court. That former name, though the name change took place in April, 1993, has been used in the style of this case through the court of appeals. Other Respondents are Susan J. Withrow, M.D., Charles Karesh, M.D., Pasqual Perrino, M.D., Steven Dolinsky, M.D., Herbert Juarbe, M.D., and Carolyn Baier, M.D. Paul R. Wiesenfeld and John H. Conrad are listed in the court of appeals opinion and order denying the petition for rehearing as "Parties in Interest." They appeared in the district court to object to certain discovery sought from them. Neither has an interest in this case, and they are not parties to this Petition.

CONTENTS

Opinions Below 1

Jurisdiction 1

Statutes and Rules Involved 1

Statement 2

A. Facts 2

B. Proceedings Below 6

Reasons for Granting the Writ 16

I. Age Discrimination 16

II. Sanctions 22

A. 22

B. 27

Conclusion 28

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970) 21

Alphin v. *Sears Roebuck & Co.*, 940 F.2d 1497 (11th Cir. 1991) 17, 19

Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986) 21

Anspec Co., Inc. v. *Johnson Controls, Inc.* 788 F.Supp. 951 (E.D. Mich. 1992) 28

Brown v. *East Mississippi Elec. Power Ass'n*, 989 F.2d 858, (5th Cir. 1993), *rehearing en banc denied*, 995 F.2d 225 (1993) 16, 17

Brown v. *Sites Concrete, Inc.*, 994 F.2d 553 (10th Cir. 1993) 17

Burns v. *Gadsden State College*, 908 F.2d 1512 (11th Cir. 1990) 17

Colsi v. *Electri-Flex Co.*, 965 F.2d 500 (7th Cir. 1992) 17

Cooter & Gell v. *Hartmarx Corp.*,]496 U.S. 384 (1990) 23, 25, 26

F.D.I.C. v. *Calhoun*, 34 F.3d 1291 (5th Cir. 1994) 25

Fields v. *Clark University* 817 F.2d 931 (1st Cir. 1987) 17

Freer v. *Mayer*, 796 F.Supp. 89 (S.D.N.Y. 1992) 28

Gagne v. *Northwestern Nat. Ins. Co.*, 881 F.2d 309 (6th Cir. 1989) 15, 17, 18

Glanz v. *Vernick*, 756 F.Supp. 632 (D.Mass. 1991) 27, 28

Guthrie v. *Tifco Industries*, 941 F.2d 374 (5th Cir. 1991), *certiorari denied*, __U.S.__, 112 S.Ct. 1267 (1992) 17

Hong v. *Children's Memorial Hospital*, 993 F.2d 1257 (7th Cir. 1993), *certiorari denied*, __U.S.__, 114 S.Ct. 1372 (1994), rehearing denied, __U.S.__, 114 S.Ct. 2695 (1994) 17

Hoover Univeral, Inc. v. *Brockway Imco, Inc.*, 809 F.2d 1039 (4th Cir. 1987) 24

Hybert v. *Hearst Corp.*, 900 F.2d 1050 (7th Cir. 1990) 19

La Pointe v. *U.A.W.*, 8 F.3d 376 (6th Cir. 1993) 17

McCarthy v. *Kemper Life Ins. Companies*, 924 F.2d 683 (7th Cir. 1987) 17

McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 (1973) 17

McKennon v. *Nashville Banner Pub.* Co., __U.S.__, 115 S.Ct. 879 (January 23, 1995) 21

Normand v. *Research Institute of America, Inc.*, 927 F.2d 857 (5th Cir. 1991) 17, 19

Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989) 16, 17, 19, 20

Robinson v. *Overseas Military Sales Corp.*, 21 F.3d 502 (2d Cir. 1994) 16, 17

St. Mary's Honor Center v. *Hicks*, __U.S.__, 113 S.Ct. 2742 (1993) 19, 20, 21

Stacks v. *Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316 (8th Cir. 1994) 17, 19

Texas Dept. of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 19

Trans World Airlines, Inc. v. *Thurston*, 469 U.S. 111 (1985) 16

Troupe v. *May Department Stores*, 20 F.3d 734 (7th Cir. 1994) 17

Turner v. *North American Rubber, Inc.*, 979 F.2d 55 (5th Cir. 1992) 17

Statutes:

28 U.S.C. 1254(1) 1

28 U.S.C. 1331 6

28 U.S.C. 1367 12

28 U.S.C. 1367(a) 1

28 U.S.C. 1367(c) 6, 27

28 U.S.C. 1391(b) 6

28 U.S.C. 1391(c) 6

29 U.S.C. 623(a)(1) 1

29 U.S.C. 626(c) 6

29 U.S.C. 626(d) 6

Rules:

FRAP Rule 38 ..... 15, 23

FRCP Rule 11 ....1, 11, 22, 23, 24, 27

FRCP Rule 54(b) 12, 27

U.S. Dist. Ct. D. Md. Rule 105 14

U.S. Sup. Ct. Rule 5.1 24

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

OPINIONS BELOW

The unreported opinion of the court of appeals is reproduced at A.1-10.[1] The unreported opinion of the district court granting summary judgment is reproduced at A.32-54. The unreported opinions of the district court relating to FRCP Rule 11 sanctions are reproduced at A.61-70 and 74-76. The unreported opinions of the district court (magistrate judge) with respect to discovery are reproduced at A.19-31. The unreported opinion of the district court denying respondents' motion to disqualify trial counsel is reproduced at A.11-18.

JURISDICTION

The judgment of the court of appeals was entered March 3, 1995. A timely filed petition for rehearing was denied by a 2 to 1 vote on April 17, 1995 (A.78-81). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

29 U.S.C.623(a)(1), 28 U.S.C. 1367(a), FRCP Rule 11 (both pre and post December 1, 1993),[2] and FRCP Rule 54(b) are reproduced in relevant parts at A.197-202.

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1 "A." references are to a separately bound Appendix.

2 Sanctions were imposed by Orders dated November 29, 1993, and December 20, 1993. The revision of Rule 11 is immaterial to this case.

STATEMENT

A. Facts

In 1964, petitioner James L. Hooper, M.D., founded a medical practice in Gaithersburg, Maryland.[3] Except for a brief period in May, 1989 (*see, infra*), Dr. Hooper was President of MMG from its inception until September, 1990. He was at all times relevant over 40 years old, was the oldest MMG "partner", and was nearing 60 when this case arose.

While the form of the practice was a professional corporation, in fact, it was operated much like a partnership. Thus, the number of shares purchased by physicians hired by Dr. Hooper directly related to their scheduled hours of work--those working full-time owning 50 shares each, and those working 3/4 time owning 37½ shares each. A physician who became a partner automatically was elected to the Board of Directors, and regardless of the number of shares owned, had an equal voice in management. When this case arose, there were, in addition to Dr. Hooper, six shareholders/ "partners"/directors of MMG, all younger than Dr. Hooper, and all of whom were brought into the practice by Dr. Hooper.

In 1989, MMG desperately needed a loan for a tax liability. The other partners believed only Dr. Hooper could obtain the loan which also was critical to them personally. Dr. Hooper, who in May, 1989, resigned as President over an unrelated disagreement, also at that time struck out his signature on loan papers. After MMG and the other partners were unsuccessful in getting the loan, five of them asked Dr. Hooper to return as President, primarily because of his perceived ability to secure the loan, which required personal guarantees, including the pledge of Dr. Hooper's home, the

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[3] At all relevant times the practice was a professional corporation. When this case arose, the corporation was named Montgomery Medical Group, P.A. In April, 1993, the name was changed to that in the caption. The corporation is referred to as "MMG."

single most valuable piece of non-corporate collateral. Dr. Hooper agreed to return based on promises of the five that he would remain President until the loan, if obtained, was satisfied (A.138).

Dr. Hooper, after returning as President based on the above-mentioned promises, was thereafter again reelected President in the late Summer or early Fall of 1989. The loan[4] was finalized in early 1990 with Dr. Hooper's home pledged as collateral.

In September, 1990, at the very first election of officers after the loan was obtained, Dr. Hooper suddenly was voted out as President. Respondent Susan Withrow was elected.[5]

Just after the September, 1990 election meeting, respondent Dolinsky, who nominated Withrow, received a phone call in the office. According to Tina Rankin, Dolinsky's secretary, Dolinsky stated to the caller:

> [W]e voted Dr. Hooper's old ass out as President and now we have younger blood running through the corporation. . . It is just a matter of time until we get his old ass out completely.

Dolinsky then told Ms. Rankin to "just act like you did not hear the phone conversation."

Almost immediately after Withrow's election and Dolinsky's above-quoted statement, MMG and the individual respondents began to harass Dr. Hooper. They demanded he vacate the office he had occupied for years. Then, he was ordered not to work in the main office, but instead to work at a satellite office 20 miles away. He was subjected to verbal abuse and generally was treated in a demeaning fashion, was

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[4] The loan is at times hereafter referred to as the "IRS loan."

[5] Dr. Hooper initially did not vote for Withrow. When the matter of her election was a *fait accompli*, Dr. Hooper stated he would "go along" with it. (A.139).

denied keys to the office, and was excluded from what were, in effect, directors' meetings held secretly among the other six partners. Dr. Hooper was treated as less than a full partner. Criticism was leveled at him at every turn, and any perceived problems were handled in condescending and sarcastic ways. MMG and the individual respondents stated they believed his conduct was damaging the corporation (A.140). (In their explanation for discharging him, respondents gave as part of their reason that Dr. Hooper had engaged in questionable financial dealings in the mid-1980's. Respondents were unable to prove any wrongdoing. The matter was dropped, and Dr. Hooper repeatedly was re-elected President by the individual respondents.) By contrast, as alleged in the Complaint, other partner physicians were not treated in like manner. In fact, one of the other partners, who had taken sexual liberties in the office with a female patient, gone to her apartment, overdosed her with drugs, and sodomized her, had no action taken against him. Dr. Hooper had wished to terminate him, but the others refused, one of them stating (to excuse the behavior) that the offending partner was "a young and unmarried man" (A.140). This improper behavior occurred in the mid-1980's (at approximately the same time as Dr. Hooper's claimed and unproven improper financial dealings) and was admitted by the "young and unmarried" physician. It resulted in legal claims against the physician and MMG (A.140).

Understandably, Dr. Hooper reacted to this harassing and disparate treatment, responding both calmly and emotionally. Finally, in early 1991, after respondent Dolinsky told Dr. Hooper he was "getting close to retirement age" and asked what it would take to get him to leave, Dr. Hooper had no remaining doubts of the others' intentions. (Dolinsky confirmed in deposition the desired departure, stating he considered offering Dr. Hooper an "emeritus" position.) Dr. Hooper was prepared to leave if MMG bought his stock at fair value. In April, 1991, he reached an oral agreement with Withrow, who, as part of her duties as President, was to deal with "Dr. Hooper problems", that he would take a leave of

absence while an agreement was negotiated for purchase of his stock. On April 18, 1991, this agreement was reduced to writing and signed by both Drs. Hooper and Withrow.[6] Withrow testified:

> All of the partners were aware and given copies of this note [the April 18 memorandum]. Dr. Hooper took a unilateral action and chose to take a leave of absence which all of us chose to accept.

Thereafter, MMG circulated memoranda confirming Dr. Hooper's leave of absence. Additionally, respondent Perrino, who had become MMG President, testified that Dr. Hooper was on a leave of absence from which he might return.

Negotiations stalled. Respondents evidenced a total lack of good faith. As part of any buy-out, they demanded a general release from Dr. Hooper and that they give Dr. Hooper no release. They made no offer for the stock.[7]

With the negotiations placed in this posture by MMG's bad faith, MMG decided to end Dr. Hooper's employment. A meeting for that purpose was called for July 31, 1991. Notwithstanding Dr. Hooper's request that the meeting be scheduled at a time when he could attend (A.141-142), the

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[6] The handwritten agreement reads (emphasis in original):

> TO: Dr. Susan Withrow
> FROM: Dr. J. Hooper
> DATE: 4/18/91
>
> Per our conversation of 4/12/91 I will be on leave effective 4/29/91 while accounts & attorneys & the board of directors work out an acceptable buy out of my stock. This is *not* a resignation!

[7] Counsel for MMG was directed by the Board to draft a buy/sell agreement applicable to *all* partners, including Dr. Hooper who at that time was a member of the Board. We were precluded from inquiring into to these consultations on grounds of attorney/client privilege (A.20-25).

MMG Board met July 31, 1991, did not re-elect Dr. Hooper a director, and voted to terminate him. He was notified by letter of August 20, 1991, that he was discharged effective October 19, 1991.[8]

In September, 1991, Dr. Hooper filed his Age Discrimination Charge. Thereafter, and prior to his official termination date, he requested lists of his Panels of patients[9] so he could, if he wished, enter private practice and notify such patients of his availability. MMG did not respond. It also failed, after knowledge of the Charge, to make loan payments it had promised to pay on Dr. Hooper's malpractice insurance premiums, failed to pay Dr. Hooper's last 60 days pay, banned him totally from the premises while he still was an employee, notified the HMO's and hospitals he was no longer affiliated with MMG while he still was employed, and refused to account to him for a computer billing partnership. Dr. Hooper amended his Charge to allege Retaliation. *See*, A. 142-143.

B. Proceedings Below[10]

This action, with jurisdiction based on 29 U.S.C. 626(c) and (d), 28 U.S.C. 1331, 1391(b) and (c), and 1367(c),[11] was filed in January, 1992. The Complaint[12] alleged

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[8] Dr. Hooper's employment contract provided that either party could terminate the agreement without cause on 60 days notice. The other corporate principals had identical contracts.

[9] A physician's Panels are members of an HMO or similar organization who have selected that physician as his or her primary care doctor.

[10] In this section, because of the sanctions issues, we also discuss the district court's rulings and procedures on matters other than Age Discrimination.

[11] The Complaint (*see*, n.12, *infra*) did not specifically rely on 28 U.S.C. 1367(c) for the non-federal claims. It pled them as pendent to the federal Age and Retaliation Counts.

[12] "Complaint", unless otherwise stated, refers to the Second Amended Complaint (A.82-100). The original complaint alleged Age Discrimination in Employment and breach of the April, 1991 leave of

Age Discrimination in Employment, Retaliation, breach of the April, 1991 leave of absence agreement, breach of contract with regard to the five individual respondents' promises to retain Dr. Hooper as President until satisfaction of the IRS loan, fraud in obtaining Dr. Hooper's signature on the loan and the pledge of his home, breaches of fiduciary duties owed in a closely held corporation, conspiracy, and ERISA violations. A jury was demanded.

The magistrate judge[13] denied discovery into malpractice and professional misconduct of younger physicians employed by MMG, notwithstanding that the Complaint specifically alleged (A.84):

> ...plaintiff had not had malpractice and other professionally related problems certain other of the individual defendants had had. All such other younger physicians were retained despite such problems, whereas plaintiff was discharged.

Discovery regarding consultations with corporate counsel about the buy/sell agreement also was denied (A.84).

The district court granted summary judgment on Counts I through VII of the Complaint. The ERISA claim in Count VIII was dismissed as moot because MMG had made the sought payments.[14]

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absence agreement; an amended complaint added the Retaliation Count. The Second Amended Complaint added the additional causes of action. Counts I and II are against all respondents. Counts III and VIII are against MMG, only. Counts VI and VII are against all the individual respondents. Counts IV and V are against all individual respondents except Withrow.

[13] The district judge referred the case to a magistrate judge for resolutions of discovery disputes (*see*, A.19).

[14] The ERISA Count was mooted when MMG provided the relief sought. The district court awarded Dr. Hooper $500 of the $5,500 in counsel fees he expended to obtain MMG's compliance. Though the action resulted in payments in five figures to Dr. Hooper and others, the

With respect to Age Discrimination, the court held Dolinsky's statement that they voted Dr. Hooper's "old ass out as President", that they now had "younger blood running through the corporation", and that it was not "just a matter of time" until they would "get his old ass completely", and his apparent knowledge of the significance of his statement by telling his secretary to forget what she had heard, irrelevant because it was "isolated [and] made over the phone to an unknown party" and was "isolated and ambiguous [and] too abstract and prejudicial." "This comment", the court said, "simply does not indicate, in context, that Dr. Dolinsky's concern was with Dr. Hooper's age rather than Dr. Hooper's management style, a style Dr. Hooper concedes was abusive" (A.39-40). The court then dismissed Dolinsky's asking what it would take to get Dr. Hooper to leave because he was "getting close to retirement age", and Dolinsky's "emeritus" status testimony as not indicating Dr. Hooper's age was a factor in his termination, stating, "These comments *more likely* demonstrate that Dr. Dolinsky recognized the problems Dr. Hooper's abusive behavior created in the office and wished to find a workable solution to the problem short of termination"(A.40, emphases added). According to the district court, because of the above, and because Dr. Hooper was not replaced by anyone, a reasonable jury could not find "that Defendants' actions were motivated by Plaintiff's age" (A.41). Additionally, though respondents offered no evidence they would have acted the same irrespective of Dr. Hooper's age, the court concluded that "even assuming that Plaintiff's evidence established that age was a motivating factor in Dr. Hooper's termination, Defendants have proven the same decision would have been reached if age had not been a

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court called the claim "relatively minor." *See*, A.57

factor" (A.41).[15]

The district court also ruled Retaliation not established (A.41-43). It found no evidence of deviation from policy by not allowing Dr. Hooper access to his Panels despite testimony (A.142) that other doctors who left MMG were permitted to notify their patients and "no causal connection between the filing of the EEOC claim and denial of access to patient information" (A.42). It also concluded that other retaliation allegations had no basis, contrary to Dr. Hooper's affidavit (A.42-43).

As to the April, 1991 leave of absence agreement, the district court held there was no contract (A.44). It did not even address the testimony of Dr. Withrow:

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[15] Respondents' stated reasons for the discharge were:

> . . . the basis for the decision to terminate Dr.Hooper was a consideration of what was in the best interests of the corporation. [Record references omitted.] More particularly, the Individual Defendants believed that Dr. Hooper's conduct was detrimental to MMG; that he was abusive to employees, disrespectful of his colleagues, disdainful of policies and procedures, and generally behaved in a manner which was both hostile and destructive. [Record references omitted.] In addition, several of the Individual Defendants believed Dr. Hooper was self-dealing and negotiating certain financial arrangements for himself with others which were contrary to his obligations to MMG as his employer. [Record references omitted.] Finally, the Board of Directors based their decision to terminate him in part on his unilateral and unauthorized "leave of absence," which was, in their opinion, directly contrary to his obligations to MMG and to the Individual Defendants.

> All of the partners were aware and given copies of this note. Dr. Hooper took a unilateral action and chose to take a leave of absence which all of us chose to accept.

Nor did it mention MMG's memoranda stating Dr. Hooper was on a leave of absence. Moreover, it concluded that the claimed terms of the agreement and Dr. Hooper's employment contract were "contradictory" and therefore that the April 18 memorandum was neither a contract nor a modification of Dr. Hooper's employment agreement (A.44), and held it "unnecessary to determine whether or not there was a promise to bargain in good faith" for the purchase of Dr. Hooper's stock because "there was [not] an agreement to buy out Dr. Hooper's MMG stock" (A.45).

The district court also rejected the breach of contract and fraud claims based on promises of five of the six "partners" to retain Dr. Hooper as President until the IRS loan was paid. It stated, despite Dr. Hooper's testimony of such an agreement and respondents' admissions that they wished Dr. Hooper to remain President primarily to obtain the loan, that there was "'no 'hard' evidence supporting Hooper's claim that there was an oral agreement." Furthermore, the court concluded that by stating he would "go along" with Withrow's election after it was a *fait accompli*, "Dr. Hooper waived any rights he may have had" (A.46-47).

With respect to the fraud claim, the court, notwithstanding that Dr. Hooper was ousted as President at the very first opportunity after the loan was obtained, found no evidence of intent not to keep the promise. It also discredited expert testimony and found no evidence of damages (A.45, 128).

There is clear law from jurisdictions other than Maryland imposing fiduciary duties between and among shareholders in a closely held corporation (*see*, A.129-130). Both respondents and the district court agreed there is no

contrary Maryland law. That notwithstanding, the court held such duties inapplicable in Maryland (A.50-51).

Following summary judgment, defendants moved for FRCP Rule 11 sanctions against "Plaintiff and/or his attorney."[16] Defendants claimed their clients' fees and expenses exceeded $176,000.[17] On November 29, 1993,[18] after receipt of our ordered response (A.145-157), the district court assessed sanctions of $5,000 against plaintiff 's counsel, payable to defendants, for signing the Second Amended Complaint and the summary judgment opposition (A.69). It found not even arguable merit to any of the first seven Counts of the Complaint. Furthermore, the court stated that it "could not conclude that the positions taken were 'not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation'" (A.63), and that "it is [the district court's] abiding conviction that this case was pursued by the Plaintiff, with the knowing assistance of his counsel, with the purpose of costing the Defendants as much as possible to defend against it" (A.63). The district court cited nothing to support this statement.[19] Moreover, the district court appeared to attempt to interfere with the relationship between Dr. Hooper and his counsel and/or to create conflict between them (A.64-65, emphases added):

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[16] Respondents' motion did not specify which pleadings they claimed were signed in violation of Rule 11.

[17] Respondents engaged two law firms which billed 1,276 hours through the summary judgment hearing for services of six attorneys and at least four paralegals. Four attorneys attended each discovery motions hearing and the summary judgment hearing, and two (at times three) defense counsel were at every deposition. They contended this legal battery and expenditure was required to deal with Dr. Hooper's claims, advocated by a single attorney whose competence they had questioned (*see*, A.145 n.1), and who billed approximately 500 hours.

[18] All dates hereafter are 1993, unless otherwise stated.

[19] As stated, *infra*, respondents were unable to cite anything to support the district court's "abiding conviction" in their brief in the court of appeals, at oral argument, or in response to our petition for rehearing.

> The Defendants have sought sanctions against Plaintiff and his attorney. * * * It is readily apparent Plaintiff 's counsel, by signing the aforementioned documents [Second Amended Complaint and Opposition to Summary Judgment], is subject to Rule 11 sanctions. Thus, sanctions will be imposed on counsel. *The extent to which Plaintiff 's counsel believes that the Plaintiff himself should bear, or share in, those sanctions is a matter for them to resolve among themselves.*

It also said that even were its judgment reversed in part, it still would impose sanctions of $5,000 (A.65-66):

> Here, even if an appellate Court were to disagree as to the imposition of sanctions regarding Count VI[3] or some other Count,[4] the bottom-line result would be the same. Plaintiff 's counsel has pursued at least several Counts in violation of Rule 11. Accordingly, the sanction amount -- being in this Court's judgment the least adequate to carry out the purpose of Rule 11-- is being set at the same level as would be imposed if Count VI (or even one or two other Counts) were not subject to sanctions.

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[3]Because of the novelty of the legal position taken.

[4]On a basis this Court cannot foresee.

While the sanctions motion was pending, Dr. Hooper moved for partial vacation of the summary judgment order (A.159-163). Not conceding the validity of any summary judgment ruling, and relying on 28 U.S.C. 1367 and FRCP Rule 54(b), he sought vacation of summary judgment on the

state law claim based on breach of fiduciary duties in a closely held corporation on the ground that the court may have ruled improvidently on an unsettled issue of Maryland law once it decided to dismiss the related federal claims.[20] We argued vacation was appropriate since final judgment was not entered and there was a Maryland case pending between the same parties on a different matter (see, A.53-53), and in which such issue could be decided.

In their opposition, and without making a separate motion, respondents suggested sanctions additional to those already sought be imposed on Dr. Hooper's counsel for filing the motion for partial vacation. At about the same time, counsel for the individual respondents wrote to the judge asking entry of judgment (A.165-166). Plaintiff 's counsel responded by letter (A.167). The court treated the letters as a motion for entry of judgment and a response, granted the same, denied the motion for partial vacation, ordered plaintiff 's counsel to respond to respondents' "motion" for further sanctions by November 30, that respondents submit by that date a statement of their costs for opposing the motion, and permitted both plaintiff 's and respondents' counsel to respond to the ordered simultaneous submissions by December 14 (A.55-57). The court also entered judgment (corrected two days later (A.59)) on Counts I through VII, and with respect to Count VIII as moot.[21]

On November 29, plaintiff 's counsel responded as ordered by the court (A.175-187), pointing out, *inter alia*, disparate treatment of counsel by the court[22], a denial of

[20] We did not contend the ERISA claim provided a basis for federal jurisdiction on state law claims. Federal jurisdiction on such claims was based solely on the Age and Retaliation Counts. The district court agreed with our assessment. See, A.53.

[21] The Corrected Judgment changed an erroneous reference to "*Defendant* James L. Hooper, M.D." (emphasis added). As stated, n.14, *supra*, the ERISA claim was mooted.

[22] The district court took no action against respondents with respect to a groundless motion to disqualify Dr. Hooper's counsel (*see*, A.11-18), no action as a result of a subpoena issued to Dr. Hooper's

Procedural Due Process,[23] potentially chilling appellate rights, and the unsubstantiated basis of the court's statements regarding plaintiff 's and his counsel's intents to cost respondents as much as possible, including, but not limited to, the fact that respondents ignored pre-litigation offers to settle for $150,000, and later $125,000, and instead chose to spend more than $176,000 to litigate. *See*, A.182, 189-190.

Respondents simply ignored the ordered (A.57-58) November 30 filing date. Instead, on November 30, they served a Bill of Costs, which states, in pertinent part, "A supplement to Defendants' Motion for Attorney's Fees and Sanctions Pursuant to Rule 11 of the Federal Rules of Civil Procedure will follow, by separate pleading, including attorneys' fees incurred by Defendants since the date of Defendants' submission of the Motion for Sanctions." Such submission was made December 14, as a purported "Reply" to our Opposition to Defendants' Motion for Further Sanctions (A.175-187). On December 13, plaintiff 's counsel served a Statement of Position (A.191-193) stating that respondents had not made the ordered November 30 filing and asking its preclusion. On the same date, he wrote to the court requesting that any untimely filing not be considered, or, alternatively, that he be given an opportunity to respond, as contemplated by the court's November 15 Order (A.195-196). Dr. Hooper also appealed from the Judgment. The following day, the district court assessed $500 in additional sanctions

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counsel (*see*, A.25-26), which at least bordered on contempt of the district court's order denying disqualification, and no action with regard to separate oppositions (contrary to their practice of joint filings) to Dr. Hooper's motion for a four day extension of time to file his opposition to the summary judgment motion (*see*, A.135). Thereafter, the district court failed to act when respondents did not make a filing ordered by the court. *See*, *infra*, and A.191-195, 55-58.

[23] The court ruled on the motion for partial vacation without awaiting a Reply (A.55-58) specifically allowed by Local Rule 105 -- a Reply filed six days before it was due. Upon reading our objection to the procedure (A.179), the court treated the Reply as a motion for reconsideration, which it denied (A.72-73).

against, payable to Defendants, counsel for having moved for partial vacation of the summary judgment (A.74-77). Sanctions were not imposed because of "the lack of merit of Plaintiff 's substantive position" or because of "any general inability to file post decisional motions." Sanctions were imposed for what the court called "the gross impropriety of Plaintiff 's counsel in filing Plaintiff 's Motion for Partial Vacation of Order of June 30, 1993 in the context of this case." A.74.

By unpublished *per curiam* opinion, the court of appeals affirmed. It held summary judgment proper for the reasons given by the district court. With respect to the Age Discrimination claim, it referred to the lower court's conclusion that "MMG had articulated a legitimate nondiscriminatory explanation for the discharge and that isolated comments such as the *one* by Dolinsky were insufficient to create a genuine issue of material fact" (A.8, emphasis added, citing *Gagne* v. *Northwestern Nat. Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989). Turning to the sanctions, the court of appeals stated,[24] "The district court imposed a $5,000 sanction . . . for filing the second amended complaint because Hooper's claims had no merit and because the case had been pursued 'with a purpose of costing the Defendants as much as possible to defend against it'" (A.9-10). It concluded the district court did not abuse its discretion with respect to either sanction (A.10).[25]

A timely filed petition filed for rehearing directed to Age Discrimination and sanctions was denied by a 2 to 1 vote (A.80-81).

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[24] The court of appeals inaccurately stated the $5,000 sanction was assessed for signing the Second Amended Complaint (A.9). Five Thousand Dollars was imposed for signing the Complaint *and* the Opposition to the Motion for Summary Judgment. *See*, A.69.

[25] MMG moved for further sanctions pursuant to FRAP Rule 38 arguing the appeal was frivolous. The motion was denied. A.9 n.2.

REASONS FOR GRANTING THE WRIT

I. Age Discrimination

In *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), this Court stated (490 U.S. at 251, plurality opinion, emphasis in original):[26]

> Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part.

In concurring, Justice O'Connor wrote that "stray remarks in the workplace, while perhaps probative of sexual harassment [citation omitted], cannot justify requiring the employer to prove its hiring or promotion practices were based on legitimate criteria" and that "statements by decisionmakers *unrelated* to the decisional process itself, [cannot] suffice to satisfy the plaintiff 's burden "in proving discriminatory motive." 490 U.S. at 277 (emphasis added). *Compare*, the dissent of Justice Kennedy indicating that even "'stray remarks'" may be "evidence of discriminatory animus" (490 U.S. at 291).

Leaving aside whether Dolinsky's remarks are direct, indirect, or circumstantial evidence of discriminatory animus (*see*, *Brown* v. *East Mississippi Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993), *rehearing en banc denied*, 995 F.2d

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[26] *Price Waterhouse* deals with sex discrimination. It also applies to other forms of employment discrimination. Age Discrimination is analyzed in the same manner as other types of discrimination. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985); *Robinson* v. *Overseas Military Sales Corp.*, 21 F.3d 502, 507-508 (2d Cir. 1994).

225 (1993); *Alphin* v. *Sears, Roebuck & Co.*, 940 F.2d 1497, 1500-1501 (11th Cir. 1991); *Normand* v. *Research Institute of America, Inc.*, 927 F.2d 857, 864 (5th Cir. 1991)), the comments were probative of the age issue. When remarks in the workplace are evidence of discrimination is critical in employment discrimination litigation. And, when such remarks are direct evidence of discrimination is crucial to deciding when the *Price Waterhouse* formula applies, or when the proof matrix of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and its progeny is appropriate.[27] Justice Kennedy wrote in his dissent in *Price Waterhouse* (490 U.S. at 291, emphases added):

> Although the *Price Waterhouse* system is not for every case, almost every plaintiff is certain to ask for a *Price Waterhouse* instruction, perhaps on the basis of "stray remarks" or other evidence of discriminatory animus. * * *

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[27] There is confusion in and within the circuits as to when such comments are relevant as well as when they are direct evidence of discriminatory animus. *See, e.g., La Pointe* v. *U.A.W.*, 8 F.3d 376, 379-380 (6th Cir. 1993); *Burns* v. *Gadsden State College*, 908 F.2d 1512, 1518-1519 (11th Cir. 1990); *Hong* v. *Children's Memorial Hospital*, 993 F.2d 1257, 1265-1266 (7th Cir. 1993), *certiorari denied*, __ U.S. __, 114 S.Ct. 1372 (1994), *rehearing denied*, __ U.S. __ , 114 S.Ct. 2695 (1994); *Troupe* v. *May Department Stores*, 20 F.3d 734, 736-737 (7th Cir. 1994); *Colsi* v. *Electri-Flex Co.*, 965 F.2d 500, 502 (7th Cir. 1992); *Brown* v. *Sites Concrete, Inc.*, 994 F.2d 553, 564 (10th Cir. 1993); *Stacks* v. *Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1324 (8th Cir. 1994); *Fields* v. *Clark University*, 817 F.2d 931, 933-935 (1st Cir. 1987); *McCarthy* v. *Kemper Life Ins. Companies*, 924 F.2d 683, 686-687 (7th Cir. 1991); *Robinson* v. *Overseas Military Sales Corp., supra*, 21 F.3d at 508; *Guthrie* v. *Tifco Industries*, 941 F.2d 374, 378-379 (5th Cir. 1991), *certiorari denied*, __U.S.__, 112 S.Ct. 1267 (1992); *Alphin* v. *Sears Roebuck & Co., supra*, 940 F.2d at 1500-1501; *Turner* v. *North American Rubber, Inc.*, 979 F.2d 55, 59 (5th Cir. 1992); *Brown* v. *East Mississippi Elec. Power Ass'n, supra*, 989 F.2d at 861; *Normand* v. *Research Institute of America, Inc., supra*, 927 F.2d at 864 n.3, and cases therein cited, including *Gagne* v. Northwestern *Nat. Ins. Co., supra*.

> *Courts will . . . be required to make the often subtle and difficult distinction between "direct" and "indirect" or "circumstantial" evidence.*

Though it may be impossible to articulate absolute standards, the existing confusion regarding "animus" evidence can be minimized. It is possible to eliminate what are, albeit unintended, apparently arbitrary and capricious determinations of the sufficiency of such evidence, and, indeed, when it even is admissible.[28]

Here, a primary decision maker, Dolinsky[29], just after the meeting at which Dr. Hooper was ousted as MMG President, received a telephone call and made statements of age animus directed at Dr. Hooper which he then told his secretary to forget she heard. Thereafter, Dolinsky asked Dr. Hooper what it would take to get him to leave since he was "getting close to retirement age." He also stated in his deposition that he considered offering Dr. Hooper an "emeritus" position. While Dr. Hooper's formal discharge was nearly a year later, immediately after ousting Dr. Hooper from the Presidency other corporate principals began a campaign of harassment intended to force Dr. Hooper's resignation. Notwithstanding the undenied harassment, the district court and the court of appeals held Dolinsky's telephone comments "isolated" and "remote" and "too prejudicial" to be evidence of discriminatory animus.[30] Both courts relied on *Gagne* v. *Northwestern Nat. Ins. Co.*, *supra*, which involved facts readily distinguishable from this case, *i.e.*, remarks clearly

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[28] We note that the court of appeals held a district court may exercise discretion to sanction counsel who relies on such evidence. *See*, *infra*, Point II.

[29] Dolinsky nominated Withrow for President.

[30] The court of appeals did not discuss Dolinsky's "getting close to retirement age" and "emeritus" statements. It simply found Dolinsky's telephone comments "isolated" and "insufficient to create an issue of fact" (A.8).

isolated, ambiguous, and not directly related to the employment decision.

The holdings of the courts below are contrary to decisions in other circuits that such remarks, at a minimum, are circumstantial evidence of discriminatory animus. *See, e.g., Alphin* v. *Sears Roebuck & Co., supra*, 940 F.2d at 1500-1501; *Stacks* v. *Southwestern Bell Yellow Pages, Inc., supra*, 27 F.3d at 1324; *Normand* v. *Research Institute of America, Inc., supra*, 927 F.2d at 864; *Hybert* v. *Hearst Corp.*, 900 F.2d 1050, 1053 (7th Cir. 1990).

Moreover, Dolinsky's statements were not the sole evidence of discrimination. There was evidence of disparate treatment unmentioned both by the district court and the court of appeals. The Complaint alleged that other younger partners had malpractice and professional misconduct problems and were retained.[31] By contrast, Dr. Hooper was discharged. One "young and unmarried" physician, who admittedly engaged in professionally improper conduct in the mid-1980's, (the same period as Dr. Hooper's alleged financial improprieties) had no action taken against him. Such conduct plainly was damaging to the corporation. It resulted in legal claims, and, obviously, any publication of the conduct to outsiders would, to put it mildly, not have been beneficial to MMG. Respondents relied on alleged and unproven conduct by Dr. Hooper in that same time frame as a reason for his discharge, claiming he was damaging the corporation.

The courts below also confused a defendant's obligation in an employment discrimination case to articulate nondiscriminatory reasons for an adverse employment action with meeting a burden of proof. *See, Price Waterhouse, supra*; *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); and *St. Mary's Honor Center* v. *Hicks*, __

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[31] As stated, *supra*, we were precluded from pursuing discovery in this area because the magistrate judge deemed the matter irrelevant. The district judge did not act on our timely filed objections; thus apparently affirming the ruling *sub silentio*. The court of appeals found the discovery rulings correct (A.10).

U.S. __ , 113 S.Ct. 2742 (1993), which state that the defendant must introduce evidence which, "*if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action." *Hicks*, *supra*, 113 S.Ct. at 2447 (emphases in original). A plaintiff "'may succeed . . . either directly by persuading the court that a reason more likely motivated the employer or indirectly by showing the employer's proffered reason is unworthy of credence'" (*Id.* at 2752, quoting *Burdine*). In a mixed motives situation, the employer must prove affirmatively it would have taken the same action *sans* the proscribed motive. *Price Waterhouse*, *supra*, 490 U.S. at 242, 258 (plurality opinion); *and see*, concurring opinions of Justices White and O'Connor (490 U.S. at 258-270); dissenting opinion of Justice Kennedy (490 U.S. at 280).

Here, there was evidence of discriminatory animus, as well as disparate treatment. Plaintiff made a *prima facie* case. Respondents claim they adduced evidence of nondiscriminatory reasons for the discharge. Assuming, *arguendo*, they met the burden of production, the matter does not end there. Dr. Hooper raised a triable issue of fact by showing those reasons not credible and thus presumably pretextual.

Respondents' reasons simply do not withstand scrutiny. They stated that part of the reason for the discharge was unproven improper financial dealings that allegedly occurred at least five years before and that Dr. Hooper took an unauthorized leave of absence. As stated above, the record shows the leave of absence not only authorized, but agreed to by MMG President Withrow and accepted by the MMG Board which circulated confirming memoranda, and that Dr. Hooper was elected President repeatedly after the claimed transgressions. The allegedly "hostile and disruptive" behavior was triggered by respondents' conduct which was designed and intended to "get [Dr. Hooper's] old ass out completely."

Whether the above reasons were the real causes of Dr. Hooper's termination, or whether a substantial reason was age, could not properly be resolved on summary judgment.[32] It was for the *trier of fact* (the jury) to make those determinations. *Hicks, supra*, 113 S.Ct. at 2753-2754.

An employer does not satisfy his *burden of proof* simply by stating nondiscriminatory reasons. Articulation of non-discriminatory reasons, once a *prima facie* case is made, simply satisfies the *burden of production*. As discussed above, respondents' reasons were questionable on their face, and Dr. Hooper presented sufficient argument, supported by evidence of record, that further placed credibility of the articulated nondiscriminatory justifications at issue.[33]

Even if on a different record Dolinsky's telephone conversation arguably might not be viewed as direct evidence of age animus with respect to the final act of discharge, it is direct evidence of animus with respect to the campaign of

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[32] Principles applicable to ruling on a summary judgment motion are well settled. The evidence is to be viewed in the light most favorable to the non-moving party, and, for purposes of the motion, credibility resolutions and all permissible inferences are to be made in favor of the non-movant. The trial judge may not try the case on papers. *See, e.g., Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-252 (1986); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970).

[33] The court of appeals states (A. 7) that on the same day as Dr. Hooper gave the leave of absence memorandum he "signed an employment contract with a competing health care provider in violation of his employment agreement with MMG." That is flatly wrong and unsupported by the record. While on leave, he went to work part time at the U.S. Census Bureau Health Unit some 40 miles away from MMG. His MMG employment contract did not prohibit other employment. Its only prohibition was employment "which would interfere with the satisfactory performance of . . . duties as an employee of [MMG]." Obviously, working elsewhere for one not in competition while on leave was not a breach the employment contract. In any event, respondents did not rely on the other employment as a reason for the discharge. There is no evidence they even knew of it. After acquired evidence cannot be used to justify a discriminatory discharge. *McKennon* v. *Nashville Banner Pub. Co.*, __U.S.__, 115 S.Ct. 879 (January 23, 1995).

harassment that began immediately thereafter with the intent to force Dr. Hooper from his employment. The record leaves little doubt respondents intended, at the least, a constructive discharge.

This was not a case of general or "stray" remarks unrelated to the employment action. Dolinsky's telephonic comments were specifically about Dr. Hooper and related to the decisional process.[34] Discriminatory conduct followed immediately. Moreover, the direct statement of animus was corroborated by Dolinsky's later remark to Dr. Hooper that he was "getting close to retirement age" followed by asking what it would take to get him to leave, and his deposition testimony that he thought of offering Dr. Hooper "emeritus" status.

If the record is read to permit a mixed motives finding, the burden shifted to respondents to prove they would have acted the same absent proscribed motivation. *Price Waterhouse*, *supra*. Respondents did not carry that burden. They were not entitled to summary judgment.[35]

II. SANCTIONS

A.

The district court imposed $5,000 in FRCP Rule 11 sanctions against Dr. Hooper's counsel for signing the Second Amended Complaint and the Opposition to Defendants' Motion for Summary Judgment (A.69). A substantial reason the district court gave for its imposition of sanctions was its perception that the case had been pursued unreasonably and vexatiously to "[cost] defendants as much as possible to defend against it" (A.63). Neither the district court, the court

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[34] In the courts below, respondents sought to diminish the significance of the comments by arguing that Rankin did not know to whom Dolinsky was speaking. To whom he was speaking is immaterial.

[35] The district court obviously engaged improperly in the weighing of evidence and choosing between conflicting inferences when it found statements "*more likely*" (emphasis added) showed nondiscriminatory motivations (A.40).

of appeals, nor respondents have cited any evidence to support this perception which the district court termed its "abiding conviction" (A.63).

Though intimating it might not have imposed sanctions were it considering the matter *de novo* (A.10),[36] the court of appeals held it could not reverse the district court's assessments of Rule 11 sanctions based on an abuse of discretion standard of review (A.10). The court of appeals misunderstood or misapplied the abuse of discretion standard of review to Rule 11 sanctions.

In *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990), this Court held all aspects of Rule 11 sanctions reviewable only for abuse of discretion. However, the Court went on to state, "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence" (*Id.* at 405)

The court of appeals reviewed a summary judgment. Sanctions were imposed, *inter alia*, for signing an opposition to the summary judgment motion.[37] Review of summary judgment is *de novo*. That notwithstanding, the court of appeals believed itself constrained to review the finding of the court below that the opposition (A.101-134) -- 28 pages replete with citations to a more than 200 page appendix from the record and supported by ample and relevant case authority-- under an abuse of discretion standard that precluded it from determining as a matter of law whether the opposition was frivolous. The court of appeals believed that whether a summary judgment opposition presents good faith

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[36] The court denied a motion for FRAP Rule 38 sanctions sought on the ground the appeal was frivolous (A.9 n.2). The appeal advanced substantially the same arguments on the merits as were made opposing summary judgment.

[37] As stated, *supra*, n.24, the court of appeals inaccurately stated the sanction was imposed for signing the Second Amended Complaint. It made no mention of the summary judgment opposition. A.9.

argument is not determined by any legal standard.[38] Since summary judgment is subject to *de novo* review, it is illogical that the determination whether an opposition to a summary judgment motion is frivolous is subject to review that precludes consideration of the filing's legal sufficiency. The approach of the court of appeals gives the district courts absolute discretion to sanction losing counsel whenever summary judgment is granted, and, conversely, absolute discretion to sanction losing counsel whenever a motion for summary judgment is denied. *See also*, A.64-65.

Rule 11 was not intended to force trial counsel to concede summary judgment where there is even a " 'glimmer of chance of prevailing.' " *Hoover Universal Inc.* v. *Brockway Imco, Inc.*, 809 F.2d 1039, 1044 (4th Cir. 1987). The standard here imposed creates a "Catch-22" and makes the practice of law all but impossible. If counsel does not make every conceivable good faith argument, he or she is guilty of not vigorously representing a client, and is subject to malpractice claims where other expert witness attorneys will testify he or she should have opposed the motion and probably would have prevailed. Nor was Rule 11 intended to make counsel "gun shy" in seeking summary judgment where that seems appropriate and can be supported by non-frivolous argument.[39]

An appellate court is in as good a position to review and evaluate the legal sufficiency of the filings as is a district

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[38] The court of appeals opinion does not expressly so state; however, this point was raised in our petition for rehearing which was denied by a 2 to 1 vote (A.80-81).

[39] Equally, if not more important, is the professional damage caused by the imposition of Rule 11 sanctions. The Chief Deputy Clerk of this Court has informed us that admission to practice automatically is denied, based on instruction from the Court, pursuant to Rule 5.1., for Rule 11 sanctions imposed within 3 years prior to application, and that there are many denials for that reason. Rule 11 sanctions thus are of serious professional consequence, not simply a pecuniary matter.

court.[40] Such review simply does not involve the "'fact intensive close calls'" that concerned the Court in *Cooter & Gell*, (496 U.S. at 404), or "factual determinations [the district court] was 'better positioned' to make" (*Id.* at 403). That is particularly so where the sanction was, as here, based only on the document itself, not in any part on the sufficiency of the pre-filing inquiry and surrounding circumstances.

The court of appeals also assumed the correctness of the district judge's "abiding conviction" that the case was pursued by "Plaintiff, with the knowing assistance of his counsel, with the purpose of costing the Defendants as much as possible to defend against it" (A.63). The district judge did not cite, mention, or refer to any supporting evidence. Notwithstanding respondents' inability to provide any evidentiary support in their brief, at oral argument, or in response to our petition for rehearing, the court of appeals affirmed the sanctions based, at least in substantial part, on the district judge's unsupported "abiding conviction." It was error for the district court not to explain in detail the factual basis for its conviction so there could be meaningful appellate review. *See*, *F.D.I.C.* v. *Calhoun*, 34 F.3d 1291, 1296-1297 (5th Cir. 1994).

Not only is there no record support for the statements of the district court. The record compels a conclusion just the opposite from that reached by the district judge. Dr. Hooper sought to settle this case on very reasonable terms, before any litigation, in a letter written for him without charge by his trial counsel (*see*, A.182, 189-190). Rather than discuss settlement, respondents spent $176,000 on litigation just through the summary judgment motion. Moreover, the $5,000 sanction was imposed for signing the Second Amended Complaint and the summary judgment opposition. Thus, the perceived vexatious and sanctionable conduct of the litigation must have occurred following that point. The

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[40] Because the appellate court is in the same position as a district court, review of a summary judgment is *de novo*.

Second Amended Complaint was filed with the understanding plaintiff would not have further discovery (A.29-30).[41] Rule 11 makes sanctionable pleadings or papers *signed* in violation of the Rule. Accordingly, sanctions properly can be imposed only from the point of signature forward. There is no record support for a conclusion trial counsel did anything untoward, improper, or vexatious following the filing of the Second Amended Complaint. Indeed, there is no record support for such conclusion as to his conduct of the litigation prior to the filing. *See also*, p.12, *supra*.

The district judge had minimal involvement in this case, having referred all pre-summary judgment matters to a magistrate judge (*see*, A.19). His only involvement was two telephone conferences, the summary judgment hearing and subsequent matters relating to mooting of the ERISA claim, the sanctions and fees motions, and related matters. The summary judgment hearing was the *only* hearing he held in this case. Thus, the district court was not "[f]amiliar with the issues and the litigants" as contemplated by *Cooter & Gell* (496 U.S. at 402).[42]

Had the trial court made a finding of fact regarding the conduct and motivation of Dr. Hooper's counsel, it would have been "clearly erroneous." *Cooter & Gell* teaches that "the abuse-of-discretion and clearly erroneous standards are indistinguishable" (496 U.S. at 401) and that when a district court bases its sanctions rulings "on a clearly erroneous assessment of the evidence" it abuses its discretion (*Id.* at 405). The court of appeals had an obligation to determine whether there was evidence to support the "abiding

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[41] Plaintiff did seek and was granted leave to serve limited interrogatories relating to new defenses raised in the Answers to the Second Amended Complaint with respect to Counts IV through VII, and minimal discovery on the ERISA count on which he prevailed by virtue of MMG's concession.

[42] The record demonstrates the district judge lacked familiarity with prior proceedings. He was unaware an order permitting the Second Amended Complaint was part of the file. See, A.53, 29.

conviction" of the district judge. It did not do so. *See*, *Calhoun*, *supra*, 34 F.3d at 1296-1297. The court of appeals expressly states that it examined the reasons given by the district court (A.10). It does not state it considered the record, or that the record contains any support for the conclusion of the district court as to the motivation or conduct of counsel.

B.

As stated, *supra*, Dr. Hooper claimed breach of fiduciary duties in a closely held corporation. Maryland precedent has not rejected the cause of action, which is recognized in other jurisdictions. *See*, A.129-130. The cause of action, which the district court rejected, was based substantially on the same facts as relied upon in support of the first seven Counts of the Complaint.[43]

FRCP Rule 54(b) provides that rulings are subject to revision until entry of final judgment. The motion for partial vacation was authorized and proper. 29 U.S.C. 1367(c) states the circumstances under which a district court may decline to exercise supplemental jurisdiction. One such instance is a novel or complex issue of state law. That was the situation here. It was perfectly proper to suggest to the court that it may have ruled improvidently once it decided to dismiss the related federal claims.[44]

Sanctions were not imposed for reasons authorized by Rule 11. The filing was not made for any improper purpose and was not frivolous. *See*, *Glanz* v. *Vernick*, 756 F.Supp.

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[43] Respondents did not object to the filing of this Count on grounds it failed to state a claim. In fact their counsel acknowledged at the hearing on the motion for leave to amend that he had advocated similar claims in other jurisdictions and stated there was no definitive Maryland precedent.

[44] It is difficult to understand how a motion the court had discretion to grant could be sanctionable. Moreover, the court could simply have denied the motion without awaiting a response. It had the motion pending 17 days before respondents filed their opposition.

632, 639 (D. Mass. 1991); *Anspec Co., Inc.* v. *Johnson Controls, Inc.*, 788 F.Supp. 951, 959-960 (E.D. Mich. 1992); *Freer* v. *Meyer*, 796 F.Supp. 89, 94 (S.D. N.Y. 1992). That notwithstanding, the court of appeals held the district court had discretion to impose sanctions.

Furthermore, again the district court imposed sanctions based on its perception that counsel was seeking needlessly to increase the cost of litigation. *See*, A.56.[45] For reasons stated in Point A, *supra*, this was an abuse of discretion because there was no evidence to support such a conclusion. *See also*, nn.17, 22, and p.25, *supra.*

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,
William A. Beeton, Jr.
Counsel of Record for Petitioners
Allen H. Sachsel
Of Counsel for Petitioners
10521 Judicial Drive
Suite 307
Fairfax, Virginia 22030
(703) 385-9400

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[45] As stated, *supra*, plaintiff based the cause of action on matters with respect to which discovery had been concluded. Discovery in this case could have been used in the state proceeding. *See*, *Freer* v. *Mayer*, *supra*, 796 F.Supp. at 94, and A.183.

Supreme Court, U.S.
FILED
JUL 14 1995

No: 95-65

In The

Supreme Court of the United States

October Term 1995

JAMES L. HOOPER, M.D., et al.,
Petitioners,

v.

PERRINO, DOLINSKY, KARESH, WITHROW, JUARBE & BAIER, M.D., P.A., et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

William A. Beeton, Jr.
Counsel of Record for Petitioners
Allen H. Sachsel
Of Counsel for Petitioners
10521 Judicial Drive
Suite 307
Fairfax, Virginia 22030
(703) 385-9400

LIBERTY LEGAL SERVICES
1111 East Main Street ◆ Richmond, VA 23219 ◆ (804) 643-6054

206 pp

CONTENTS

Cases

Page

Opinion of the United States Court of Appeals of the Fourth Circuit 1

Memorandum and Order of District Court of May 14, 1992, Denying Defendants' Motion to Disqualify Plaintiff's Counsel 11

Memorandum of December 11, 1992, of Magistrate Judge Kenkel 19

Order of December 11, 1992, of Magistrate Judge Kenkel 27

Memorandum and Order of January 26, 1993, of Magistrate Judge Kenkel 29

Memorandum and Order of District Court of June 30, 1993, Granting Defendants' Motion for Summary Judgment on Counts I through VII 32

Memorandum and Order of District Court of November 15, 1993, Denying Motion for Partial Vacation of Order of June 30, 1993 55

Corrected Judgment Order of District Court of November 17, 1993 59

Page

Memorandum and Order of District Court of November 29, 1993, Awarding $5,000 in FRCP Rule 11 Sanctions Against Plaintiff's Counsel and Awarding Plaintiff $500 in Attorney's Fees for Count VIII 61

Order of November 29, 1993, Imposing $5,000 in FRCP Rule 11 Sanctions Against Plaintiff's Counsel 71

Memorandum and Order of District Court of December 14, 1993, Purporting to Correct Failure to Consider Plaintiff's Timely Filed Reply 72

Memorandum and Order of District Court of December 20, 1993, Imposing $500 in Additional FRCP Rule 11 Sanctions Against Plaintiff's Counsel 74

Order of District Court of December 20, 1993, Imposing $500 in Additional FRCP Rule 11 Sanctions Against Plaintiff's Counsel 77

Order of United States Court of Appeals for the Fourth Circuit Denying by 2 to 1 Vote Appellants' Timely Filed Petition for Rehearing 78

Second Amended Complaint 82

Plaintiff's Opposition to Defendant's Motion for Summary Judgment 101

Affidavit of James L. Hooper 136

Page

Plaintiff's Opposition to Defendants' Motion for Rule 11 Sanctions 145

Plaintiff's Motion for Partial Vacation of Order of June 30, 1993 159

Memorandum in Support of Plaintiff's Motion for Partial Vacation of Order of June 30, 1993 160

Letter of November 5, 1993, to Judge Garbis from Albert D. Brault, Esquire 165

Letter of November 8, 1993, to Judge Garbis from Allen H. Sachsel, Esquire 167

Reply to Opposition to Motion for Partial Vacation of Order of June 30, 1993 168

Opposition to Defendants' Request for Further Sanctions 175

Letter of July 23, 1991, to MMG Board of Directors from James L. Hooper, M.D. 189

Plaintiff's Statement of Position 191

Letter of December 13, 1993, to Judge Garbis from Allen H. Sachsel, Esquire 195

Statutes and Rules 197

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JAMES L. HOOPER, M.D.,
Plaintiff-Appellant,

v.

MONTGOMERY MEDICAL GROUP, P.A.; SUSAN J. WITHROW, M.D.; CHARLES KARESH, M.D.; STEVEN DOLINSKY, M.D.; PASQUAL PERRINO, M.D.; CAROLYN BAIER, M.D.; HERBERT JUARBE, M.D.,
Defendants-Appellees,

and

PAUL R. WEISENFELD; JOHN H. CONRAD,
Parties in Interest.

No. 93-2631

JAMES L. HOOPER, M.D.,
Plaintiff-Appellant,

v.

MONTGOMERY MEDICAL GROUP, P.A.; SUSAN J. WITHROW, M.D.; CHARLES KARESH, M.D.; STEVEN DOLINSKY, M.D.; PASQUAL PERRINO, M.D.; CAROLYN BAIER, M.D.; HERBERT JUARBE, M.D.,
Defendants-Appellees,

v.

PAUL R. WEISENFELD; JOHN H. CONRAD,
Parties in Interest.

No. 94-1022

BEST AVAIL

In Re: ALLEN H. SACHSEL,
Appellant.

JAMES L. HOOPER, M.D.,
Plaintiff.

V.

MONTGOMERY MEDICAL GROUP, P.A.; SUSAN J. WITHROW, M.D.; CHARLES KARESH, M.D.; STEVEN DOLINSKY, M.D.; PASQUAL PERRINO, M.D.; CAROLYN BAIER, M.D.; HERBERT JUARBE, M.D.,
Defendants-Appellees.

V.

PAUL R. WEISENFELD; JOHN H. CONRAD,
Parties in Interest.

No. 94-1038

BLE COPY

JAMES L. HOOPER, M.D.,
Plaintiff-Appellant,

v.

MONTGOMERY MEDICAL GROUP, P.A.; SUSAN J. WITHROW, M.D.; CHARLES KARESH, M.D.; STEVEN DOLINSKY, M.D.; PASQUAL PERRINO, M.D.; CAROLYN BAIER, M.D.; HERBERT JUARBE, M.D.,
Defendants-Appellees,

v.

PAUL R. WEISENFELD; JOHN H. CONRAD,
Parties in Interest.

No. 94-1056

In Re: ALLEN H. SACHSEL,
Appellant,

JAMES L. HOOPER, M.D.,
Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A.; SUSAN J. WITHROW, M.D.; CHARLES KARESH, M.D.; STEVEN DOLINSKY, M.D.; PASQUAL PERRINO, M.D.; CAROLYN BAIER, M.D.; HERBERT JUARBE, M.D.,
Defendants-Appellees,

and

PAUL R. WEISENFELD; JOHN H. CONRAD,
Parties in Interest.

No. 94-1141

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
M. J. Garbis, District Judge.
(CA-92-529-MJG)

Argued: February 1, 1995

Decided: March 3, 1995

Before HALL and WILKINS, Circuit Judges,
and CHAPMAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Allan Huberth Sachsel, Fairfax, Virginia, for Appellants. Albert David Brault, BRAULT, GRAHAM, SCOTT & BRAULT, Rockville, Maryland, for Individual Appellees; Jeffrey Martin Schwaber, STEIN, SPERLING, BENNET, DE JONG, DRISCOLL, GREENFEIG & METRO, P.C., Rockville, Maryland, for Appellee Montgomery Medical Group. **ON BRIEF:** David G. Mulquin, BRAULT, GRAHAM, SCOTT & BRAULT, Rockville, Maryland, for Individual Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

James L. Hooper, M.D., appeals a decision of the district court granting summary judgment in favor of Montgomery Medical Group, P.A. (MMG) and the members of its Board of Directors[1] on various claims related to his discharge from employment with MMG. Hooper's attorney, Allen Sachsel, appeals from a decision of the district court imposing sanctions against him pursuant to Federal Rule of Civil Procedure 11. We affirm.

I.

Considered in the light most favorable to Hooper, the facts are as follows. MMG was controlled by a Board of Directors, the members of which were referred to as partners, and all of whom were practicing physicians and shareholders of MMG. Hooper had served as Pres-

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[1]The Board members were Susan J. Withrow, M.D., Charles Karesh, M.D., Steven Dolinsky, M.D., Pasqual Perrino, M.D., Carolyn Baier, M.D., and Herbert Juarbe, M.D.

ident of MMG since he founded it in 1964. The partners, including Hooper, were employed pursuant to employment agreements that provided, *inter alia*, that they could be terminated by the Board after 60 days written notice.

In early 1989, the Board learned that MMG had failed to pay approximately $1 million in federal employment withholding taxes and that each partner was personally liable for this obligation. Soon thereafter, the relationship between Hooper and the other partners began to deteriorate for reasons unrelated to the tax liability, and Hooper resigned as President of MMG in May 1989. Hooper initially refused to cooperate with the other partners in securing a loan to pay the overdue taxes. However, after Hooper was reelected President of the Board in the summer of 1989, he subsequently agreed to serve as a guarantor of the loan and use his home as a portion of the collateral. According to Hooper, his concessions with respect to the loan were made in exchange for the partners' oral commitment that he would be permitted to serve as President until the loan was paid in full.

In September 1990, the Board—including Hooper—unanimously voted to elect partner Susan Withrow as President. Soon after this vote, another partner, Steven Dolinsky, was overheard saying that "we voted Dr. Hooper's old ass out as President and now we have younger blood running through the corporation. . . . It is just a matter of time until we get his old ass out completely."

In April 1991, Hooper presented to Withrow a handwritten memorandum, which she signed, indicating that he would take an unpaid leave of absence effective April 29, 1991 "while accountants and attorneys and the Board of Directors work[ed] out an acceptable buy out of [his] stock." On the same day, Hooper signed an employment contract with a competing health care provider in violation of his employment agreement with MMG. At its July 1991 meeting, the Board voted to discharge Hooper and provided him with the required 60 days notice of termination.

Hooper filed a complaint with the Equal Employment Opportunity Commission (EEOC) in September 1991, claiming that he was terminated because of his age. He later amended his EEOC complaint to allege that the partners retaliated against him for filing the complaint

by, *inter alia*, not allowing him access to certain of his patient lists. Additionally, during this time Hooper was negotiating with MMG for benefits he claimed he was due from a pension plan formerly administered by MMG, which was subject to the Employee Retirement Income Security Act (ERISA).

Hooper brought this action in February 1992. In a second amended complaint, he alleged: (1) age discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C.A. § 621 *et seq.* (West 1985 & Supp. 1994); (2) retaliation for filing the EEOC complaint, *see* 29 U.S.C.A. § 623(d) (West 1985); (3) breach of a written contract with MMG to keep him on an unpaid leave of absence while the partners negotiated to purchase his stock; (4) breach of an oral contract with the individual Board members to retain him as President until the loan was paid in full; (5) fraud; (6) breach of fiduciary duty; (7) civil conspiracy; and (8) ERISA violations. The district court granted summary judgment to the defendants on all claims except the ERISA violations, and later imposed $5,500 in sanctions against Sachsel pursuant to Federal Rule of Civil Procedure 11. Hooper and Sachsel now appeal.

II.

A.

The district court ruled in favor of MMG on the age discrimination claim because it concluded that MMG had articulated a legitimate, nondiscriminatory explanation for the discharge and that isolated comments such as the one by Dolinsky were insufficient to create a genuine issue of material fact. *See Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989). And, the district court granted summary judgment on the retaliation claim because it concluded that the evidence was insufficient to create a genuine issue of material fact concerning a causal connection between the filing of the EEOC complaint and the denial of access to the patient information; the district court reasoned that Hooper would have been denied access in any event because of his discharge. The district court also concluded that the alleged written contract was not violated by MMG because even Hooper admitted that the contract did not supersede his employment agreement. The district court next found the evidence insufficient as

a matter of law for a jury to find an oral contract and explained that even if there were sufficient evidence to make the existence of the oral contract a jury question, Hooper suffered no damage by the partners' failure to retain him as President. Finally, the district court determined that there was no basis under Maryland law to find a fiduciary duty among directors in a corporation and that there was insufficient factual support for the fraud or civil conspiracy claims to survive summary judgment. We agree and affirm the grant of summary judgment for the reasons stated in the order of the district court. *Hooper v. Montgomery Medical Group, P.A.*, C/A No. 92-529 (D. Md. July 6, 1993) (summary judgment order).

B.

The parties settled Hooper's ERISA claim after the district court refused to grant summary judgment on this issue. The district court later granted Hooper $500 in attorney's fees, an award Hooper now appeals as being insufficient.

A district court may, in its discretion, award attorney's fees in an ERISA action, but there is no presumption in favor of awarding fees to the prevailing party. *See Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1028-30 (4th Cir. 1993) (en banc). The purpose of the $500 award was to compensate Hooper for attorney's fees he incurred with respect to the ERISA claim between the time MMG decided to settle the claim on Hooper's terms and MMG's notification to Hooper of this fact. We find no abuse of discretion and affirm for the reasons stated in the order of the district court. *Hooper v. Montgomery Medical Group, P.A.*, C/A No. 92-529 (D. Md. Nov. 29, 1993) (order awarding attorney's fees and imposing a $5,000 sanction).[2]

III.

The district court imposed a $5,000 sanction against Sachsel for filing the second amended complaint because Hooper's claims had no merit and because the case had been pursued "with a purpose of cost-

[2]MMG moved for this court to impose additional sanctions pursuant to Federal Rule of Appellate Procedure 38 for the filing of this appeal, arguing that it is frivolous. We deny the motion.

ing the Defendants as much as possible to defend against it." Further, when Hooper moved to partially vacate the summary judgment order to allow the breach of fiduciary duty claim to be brought in state court, the district court imposed an additional $500 sanction against Sachsel. Sachsel appeals the sanctions. In reviewing an award of sanctions, the issue for us is not whether we would have awarded sanctions were we deciding the question in the first instance, but whether the district court abused its discretion in choosing to award sanctions and selecting the amount of sanctions. *See Robeson Defense Comm. v. Britt (In Re Kunstler)*, 914 F.2d 505, 513 (4th Cir. 1990), *cert. denied*, 499 U.S. 969 (1991). After carefully reviewing the orders of the district court detailing the reasons for its imposition of sanctions, we find no abuse of discretion and affirm. *Hooper v. Montgomery Medical Group, P.A.*, C/A No. 92-529 (D. Md. Nov. 29, 1993) (order awarding attorney's fees and imposing a $5,000 sanction); *Hooper v. Montgomery Medical Group, P.A.*, C/A No. 92-529 (D. Md. Dec. 20, 1993) (order imposing a $500 sanction).

IV.

We have considered the other arguments advanced by Hooper, including his claims of error regarding discovery rulings, and find them to be without merit. Accordingly, we affirm the district court in all respects.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

MEMORANDUM AND ORDER

(Entered May 18, 1992)

The Court has before it the Motion to Disqualify Allen H. Sachsel as Plaintiff 's Counsel and the materials submitted in connection therewith. The Court finds that a hearing is unnecessary to resolve the issues presented.

The Cause of Action[1]

Plaintiff James L. Hooper, M.D. ("Hooper") was the founder, and remains a stockholder, of Defendant Montgomery Medical Group, P.A. (MMG), a professional corporation engaged in medical practice. The individual Defendants were at all relevant times stockholders as well as officers and/or directors of MMG.

In September of 1990 the individual Defendants replaced Hooper as President of MMG with Defendant Susan J. Withrow, M.D. ("Withrow") and began a campaign of harassment, etc. to force him to terminate employment. Hooper took a leave of absence pursuant to an agreement

[1] The cause of action in issue is stated as alleged by Plaintiff. Of course, the Court is assuming, and not finding, these allegations to be true.

(with MMG) providing that he would retain his employment status during the process of negotiating for the sale of his stock in MMG. On August 20, 1991 Hooper's employment was terminated.

In this context, Hooper has sued MMG for breach of contract and all Defendants for age discrimination.

Facts Regarding Disqualification

The following facts are relevant to the Motion to Disqualify:

1. Allen H. Sachsel, Esquire was counsel for Hooper in various matters starting in the late 1970's and also, from time to time, represented MMG in some matters which are not contended to be material to the instant case.

2. As described below Sachsel defended MMG, Hooper and Withrow against claims made in the EEOC and state court by an independent contractor physician named Cooper. These proceedings, referred to herein collectively as "the Cooper Case." are alleged by Defendants to be materially related to the instant case.

3. In 1988 an independent contractor physician (Cooper) filed an EEOC complaint against MMG, Hooper and Withrow. Sachsel represented these three parties and succeeded in having the case dismissed due to lack of

jurisdiction in that Cooper was not an employee.

4. In 1988 or 1989 Cooper also filed a state court law suit against MMG, Hooper and Withrow alleging racial discrimination, breach of contract and intentional infliction of emotional distress.

5. Prior to the trial of the Cooper law suit, problems in the instant case had arisen between Hooper and the individual Defendants (including Withrow). Sachsel advised Withrow and other MMG directors that he was representing Hooper in the MMG dispute and would not discuss with them any problems with Hooper.

6. In the Cooper case, the racial discrimination charge was dropped promptly after Cooper obtained counsel. The case eventually proceeded to trial only on the breach of contract claim against MMG and resulted in a judgment for MMG based on a Statute of Frauds defense.

7. There is nothing presented to this Court which establishes that there was any confidential communication to Sachsel which might be relevant to the instant case other than, possibly, communications from Hooper to Sachsel.

The Substantial Relationship Test

A client who entrusts a confidential communication to an attorney must be secure in his expectation that the attorney will not make unauthorized disclosure or use of the confidence. While the outer limits of the client's rights in this regard may sometimes be subject to debate, at the very core is the client's right not to have the confidential communication disclosed to, or used for, a party adverse to the client. Accordingly, there is an absolute rule that an attorney (absent consent in appropriate circumstances) cannot simultaneously represent parties with adverse interests. See The Maryland Lawyers' Rules of Professional Conduct, Rule 1.7.

When the representation is not simultaneous, the prohibition is not absolute. A lawyer is not necessarily prohibited from representing a client whose interests are adverse to a former client. As stated in *Satellite Fin. Planning v. 1st Nat. Bk. Wilmington*, 652 F. Supp. 1281, 1282-83 (D.Del.1987):

> The appropriate standard in ruling on a motion to disqualify counsel based upon prior representation of a present adversary is the "substantial relationship" test. *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F. 2d 221, 223 (7th Cir. 1978)... Disqualification is appropriate when the subject matter of the new litigation is substantially related to the subject matter of the past representation. ... The underlying purpose for the rule is to ensure that a client's confidential communications to his lawyer are not used against that client when his lawyer later represents a party adverse to the former client. ...

> Despite this strong policy rationale, the rule prohibiting representation of a new client against a former client is not a per se rule. Instead, a court should undertake a "painstaking analysis of the facts" and evaluate applicable precedent before disqualifying counsel. *Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F. 2d 1020, 1029 (5th Cir. 1981), *cert. denied*, 454 U.S. 895, 102 S. Ct. 394, 70 L.Ed.2d 211 (1981). Only if the moving party proves the requisite substantial relationship should a lawyer be disqualified. A movant for disqualification must have evidence to buttress his claim of conflict because a litigant should, as much as possible, be able to use the counsel of his choice. ...

The United States Court of Appeals for the Fourth Circuit has recognized that the courts must be careful not to disqualify a party's attorney of choice by the adherence to rigid rules which may not fit the particular case. In *Aetna Cas. and Sur. Co. v. The United States*, 570 F. 2d 1197, 1202 (4th Cir.) *cert. denied*, 439 U.S. 821 (1978) the appellate court reversed the district court's order disqualifying government counsel from representing four individual air controllers in an airplane crash case. Although *Aetna* does not relate to the precise issues presented herein, the decision contains the significant pronouncement by the Fourth Circuit that it was "in full accord" with the statement the Connecticut Bar Association had made to the Second Circuit[2] that:

> "[I]t behooves this Court, therefore, while mindful of the existing codes [of ethics], to examine afresh the problems sought to be met

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[2] See *International Electronics Corp. v. Flanzer*, 527 F.2d 1288 (2nd Cir. 1975).

> by that code, to weigh for itself what those problems are, how real in the practical world they are in fact, and whether a mechanical and didactic application of the Code to all situations automatically might not be productive of more harm than good, by requiring that client and the judicial system sacrifice more than the value of the presumed benefits."

The prior representation of two Defendants here must be analyzed to determine whether it was likely that confidential communications substantially related to the present lawsuit were made to Sachsel. As stated by Judge Wright in *Satellite, supra*, 652 F.Supp at 1284:

> "In determining whether a fact [relevant to the present litigation] might have been disclosed [in the prior representation], the Court should consider whether a client and lawyer ought to have discussed the relevant facts or whether it would not have been unusual for the lawyer and client to have discussed the relevant facts.
>
> ***
>
> When resolving this ... question, ' the court should not allow its imagination to run free with a view of hypothesizing conceivable but unlikely situations in which confidential information 'might' have been disclosed which would be relevant to the present suit.' *INA Underwriters*, 594 F.Supp.
> at 1206."

This Court would state the essential question to be whether there is a realistic probability any confidential

communications from Defendants Withrow or MMG to Sachsel could be used to their detriment in this case.

Insofar as the breach of contract claim is concerned, there is no relationship at all between the instant dispute and the Cooper case. As to the age discrimination claim in Count I, there is at most a minimal relationship because Cooper, also, made a claim on a discrimination theory. However, other than the label of discrimination claims, the two causes of action have no real similarity. Moreover, Cooper never even got to the merits on his discrimination claim.

In the particular context of this case, it is important to note that Hooper (the present client) was a Co-Defendant with Withrow and MMG in the Cooper case. Therefore, any attorney now representing Hooper would, necessarily, properly be receiving and using any information that Hooper could provide. Accordingly, in this case, the proper question is whether, other than information which Hooper can provide or has properly provided, there was any materially related information communicated in confidence to Sachsel.

The case of *Stitz v. Bethlehem Steel Corp.*, 650 F.Supp. 914 (D.Md. 1987) involved a situation far different from that presented here. In *Stitz* the plaintiff 's attorney has been a Bethlehem Steel employee for 10 years working as counsel in the corporate labor department seeking to represent an employee in a labor dispute against the Corporation. In this context, Judge Young of this Court disqualified the attorney, but did not disqualify a co-counsel law firm absent evidence of any transmission of confidential information to the firm. Here, Sachsel's representation of Defendants MMG and Withrow was, as relates to this case, a "one shot" deal in a case involving only limited relationship to the instant dispute.

On the sparse record presented by Defendants, the Court sees no evidence of, and no likelihood that, confidential disclosures were made by any present Defendant to Sachsel

that could in any realistic fashion be used in their detriment. In sum, this court concludes that Defendants have established no likelihood much less the fact that they made any confidential communication to Sachsel which bears any substantial relationship to the present lawsuit.

For the foregoing reasons:

1. Motion to Disqualify Allen H. Sachsel as Plaintiff's Counsel is **DENIED**.

2. Counsel for Plaintiff shall arrange a telephone conference prior to June 5, 1992 to set the scheduling of further proceedings in this case.

SO ORDERED this 14th day of May, 1992.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

MEMORANDUM

(Entered December 23, 1992)

By order dated October 5, 1992 (Garbis, J.), this case was referred for determination of all discovery disputes. On December 3, 1992 a hearing was held on the following pending motions: (1) Plaintiff 's Motion to Compel More Complete Answers to Interrogatories and for the Production of Documents; (2) Plaintiff 's Second Motion to Compel; and (3) Plaintiff 's Motion to Quash Subpoena.

Plaintiff brings this action under the Age Discrimination and Employment Act, 29 U.S.C. § 621 *et seq.* Plaintiff claims that the defendants, the Montgomery Medical Group (MMG) and the individual physicians, discriminated against him on the basis of age when the Board of Directors of MMG voted plaintiff out as President of the MMG and subsequently terminated his employment. MMG was comprised of seven medical doctors, including plaintiff, who all served as Directors and who were the sole shareholders of the corporation. Plaintiff served as the President of the Board up until the events leading to this litigation.

(1) Plaintiff 's Motion to Compel

Two issues remained outstanding at the time of the hearing. Plaintiff sought the addresses and telephone numbers of persons identified as having factual information in response to Interrogatory No 2. Defendants agreed to provide the addresses and to provide the last known telephone numbers if reasonably available.

Next, through Interrogatory No. 4, plaintiff seeks a list and description of every malpractice claim made or pending against each of the individual defendants. Defendants object on the ground that this information is not reasonably calculated to lead to the discovery of admissible evidence. At the hearing, defendants proffered that their defense to the age discrimination claim, i.e. the legitimate business reason for plaintiff 's leaving MMG, in no way relies on the issue of medical conduct or misconduct. Instead, defendant's will seek to show that the plaintiff 's "termination", was the result of disagreements over personnel matters and compensation issues. Plaintiff argued that the issue of medical proficiency was raised by other Group members during depositions and that malpractice claims against other group members still with the group will tend to show disparate treatment on the part of the MMG against Plaintiff.

Under Fed. R. Civil P. 26, a matter is discoverable, unless otherwise privileged, "which is relevant to the subject matter involved in the pending action." Rule 26(1). Relevance, for discovery purposes, is broadly and liberally construed. Information is "relevant" even if not admissible at trial, as long as it is "reasonably calculated to lead to the discovery of admissible evidence." *Moore's Manual, Federal Practice and Procedure*, Vol. II, § 15.02[1]. Applying this standard, the court is not convinced that at this point in the litigation, the information on medical malpractice claims against other Medical Group members is "relevant" under

Rule 26. Unless and until defendants, or other facts revealed during the course of this litigation, place plaintiff 's medical competency at issue, the existence of such claims cannot reasonably be calculated to lead to the discovery of admissible evidence.

(2) Plaintiff 's Second Motion to Compel

Through this motion, plaintiff seeks disclosure of communications between the Directors of MMG and corporate counsel. The first request involves the "1989 Consultations". The underlying facts involving these communications are for the most part not in dispute. On or about May 1, 1989 plaintiff, who had been serving as President since the formation of the corporation, submitted a tape recording to be played at the Board Meeting. In the transcript (Exhibit 1 of Defendants' Opposition), plaintiff states, *inter alia*, that

> "I hereby as of this date resign as president of the corporation. This decision is irrevocable and not open for discussion. [Court's repetition of same sentence deleted.] I would hope that you will select a new president prior to my returning and I will make available to him or her my office and I will move to another area. Henceforth I will do only what is necessary of me as a partner and nothing more or less."

Thereafter, by handwritten note dated May 8, 1989 (Exhibit 2 to Defendants' Opposition), plaintiff resigns from the Board of Directors and as an employee effective ninety days from that date. However, the parties agree that plaintiff 's resignation was never acted upon and that except for approximately a month following the May meeting, he served as President as the Board until being voted out in September 1990. Plaintiff

further argued at the hearing on the motion, and not challenged by defendants, that he remained a director of the corporation up until July 31, 1991.

Based on the tape recorded resignation, "[a]s a result of Dr. Hooper's unilateral and unexpected actions, the other shareholders of MMG consulted with corporate counsel in an effort to determine how best to respond and/or react." (Affidavit of Pasqual Perrino, M.D. attached to Defendants' Opposition.) Defendants argue that these attorney/client communications are protected from disclosure to plaintiff since plaintiff 's position was "adversarial" to the corporation when he resigned as president.

The next communication at issue involve the "1990 Buy/Sell Consultations". In October 1990, corporate counsel received a letter from S. David Elling, Esq. writhing on behalf of his client, the plaintiff. (Exhibit 3 of Defendants' Opposition). In essence the letter seeks to set "non-negotiable" terms for the continued operation of the MMG including the drafting of a Buy/Sell Agreement. The letter also sets out the consequences of failure to agree on the terms, including dissolution of Medical Group, equitable distribution of assets and defamation action against an unidentified member. In response to this letter, "[o]n or about November 1, 1990 MMG engaged the law firm of Stein, Sperling, Bennett, De Jong, Driscoll, Greenfeig & Metro, P.A. to investigate and respond to demands and threats" made in the letter from attorney Elling. (Affidavit of Pasqual Perrino, Attachment to Defendants' Opposition). Again, defendants argue that these communications are protected in that at the time of the communications, plaintiff was in a adversarial position to MMG. Plaintiff, focusing on the buy/sell agreement alluded to in Elling's letter, and noting two of the other directors' deposition testimony, argues that corporate counsel was retained to draft a but/sell agreement to be reviewed, and if agreed executed, by all of the directors, and

therefore, as a director, he is entitled to those communications.

The Fourth Circuit has recently explored the complicated application of the attorney work product doctrine to corporate entities. In San*dberg v. Virginia Bankshares, Inc.*, ___F.2d___, 1992 WL 297061 (4th Cir. Va.) the court addressed the rights of shareholders to gain access to communications protected by the privilege. Before addressing this specific issue, the court noted that the purpose of the attorney client privilege is to encourage full and frank communications between attorneys and their clients which supports the broader public interest in the observance of law and the administration of justice and that the privilege applies with equal force where the client is a corporation. *Id.* at 12. However, it is not an absolute privilege and "is subject to the qualification that any injury which would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation. Since the privilege impedes the full and free discovery of the truth and is in derogation of the public's right to every person's evidence, it is not favored by the federal courts. Accordingly, the privilege is to be strictly confined in the narrowest possible limits consistent with the logic of the principles." *Id.*(citations omitted).

In *Sandberg*, minority shareholders brought suit alleging unlawful solicitation of proxies and breach of fiduciary duties by defendants. During the course of the litigation, plaintiffs were denied access to notes and information concerning a meeting between one of the directors and corporate legal counsel concerning the upcoming merger which was the subject matter of the litigation. The court, adopting the analysis of *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) held that where the corporation's shareholders charge that the corporation's directors have acted inimically to shareholders interests, the shareholders may show

"good cause" why the corporation should not be able to invoke the attorney client privilege. A nine factor test is applied to determine whether good cause supports disclosure. *Sandberg* at 13-14.

Applying the *Sandberg* factors in the instant case, the resulting conclusions may weigh in favor of disclosure. However, because plaintiff in the instant case was both a minority shareholder and a director at the time of the communications and because of the facts underlying the communications at the issue, application of the privilege in the instant case is not fully settled by the nine factors of *Sandberg*. In fact, the court in *Sanderberg* addressed the essential problem presented in the instant case and argued by MMG:

> "[Defendant] Bankshares argues that the good cause exception does not apply because the communication...involve legal advice sought by management in defending against a suit brought by shareholders. *If a corporation cannot assert the attorney client privilege to protect such communications...then a corporation could never effectively defend themselves in legal proceedings commenced by shareholders since they could not obtain confidential legal advice. If the sole purpose of the ...meeting were consultation regarding legal strategies in the state court proceedings, then this argument might persuade us."*

Id. at 14. Here, MMG argues that the sole purpose for the two consultations were as a direct response to plaintiff 's actions in first, tendering his resignation as President and second, in retaining legal counsel to threaten litigation if plaintiff 's demands for future business terms were not met. While in *Sandberg* the litigation had actually been instituted, the argument that a corporation, faced with an adversarial

board member, must be entitled to secure confidential legal advice in such situations is persuasive.[1]

However, as directed by the Fourth Circuit, application of this principal in particular case must be "strictly confined within the narrowest possible limits consistent with the logic of its principle." *Sandberg* at 12. Here, since the issue in the major issue in the pending litigation is the defendants' motives in removing plaintiff as President and not continuing the contractual relationship between plaintiff and MMG, the defendants should not be able to hide behind the privilege to shield potential evidence of unlawful motive. Further, if from the documents centering on the buy/sell agreement it appears that counsel was retained to draft a common agreement for the benefit of all the directors, plaintiff would surely be entitled to those communication. In light of these facts, and with the court's preliminary ruling that the communications are protected, defendants, through counsel, shall produce to the court the communications to which they assert the privilege for an *in camera* inspection.

(3) Plaintiff 's Motion to Quash Subpoena

Defendant MMG has subpoenaed plaintiff 's attorney, Allen H. Sachsel, to appear for a deposition and for the production of documents. The scope of these requests is focused on Mr. Sachsel's prior representation of MMG and all documents related thereto. As stated by this court during the motions hearing, Judge Garbis' order denying MMG's motion

[1] The instant case should be distinguished from the factual setting in *Gottlier v. O. T. Wiles, et al.*, 143 F.R.D. 241 (D.Colo. 1992). In that case the court found that a former director and officer of the corporation was entitled to protected communications generated during his tenure even though by the filing of the law suit his interests were adverse to the corporation's. The court found that the documents were generated during a period "of common interest". *Id* at 246. In the instant case the reverse is true; the documents and communications were generated as a direct result of the parties *adverse* interests.

for disqualification of Mr. Sachsel is dispositive of this issue. Judge Garbis found that the prior representation did not have "any substantial relationship to the present lawsuit.:" (Paper 15 at 7). Defendant MMG's argument that Mr. Sachsel may have formed an opinion as to whether MMG discriminated in the prior case and that such an opinion is relevant here, is without merit.

Based on the foregoing, a separate order shall be entered consistent with this Memorandum

/s/ James E. Kenkel
James E. Kenkel
U.S. Magistrate Judge

Filed: December 11, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

ORDER

(Entered December 23, 1992)

Based on the foregoing Memorandum it is this 11th day of December, 1992, hereby ORDERED,

1. That Plaintiff 's Motion to Compel Answer to Interrogatory No. 2 be and the same is hereby GRANTED.

2. That Plaintiff 's Motion to Compel Answers and Documents relating to Interrogatory No. 4 be and the same is hereby DENIED.

3. That Plaintiff 's Second Motion to Compel be and the same is hereby DENIED.

4. That within 20 days of the date of this order defendants provide to the court for *in camera* review the documents at issue in Plaintiff 's Second Motion to Compel.

5. That Plaintiff 's Motion to Quash Subpoena is GRANTED.

/s/James E. Kenkel
James E. Kenkel
U.S. Magistrate Judge

Filed: December 11, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,
v.
MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

MEMORANDUM AND ORDER

(Entered January 27, 1993)

By order dated October 5, 1992 (Garbis, J.), this case was referred for determination of all discovery disputes. On January 25, 1993 a hearing was held on the following pending motions: (1) plaintiff 's Motion for Leave to File a Second Amended Complaint; (2) defendants' Motion to Compel More Complete Answers to Interrogatories and Request for Documents; and (3) plaintiff 's and deponents' Motion to Quash Subpoenas to Paul Weisenfeld and John H. Conrad. After consideration of the pleadings and argument of counsel, and for the reasons stated in open court, it is the 26th day of January, 1993, hereby

ORDERED:

1. That plaintiff 's Motion for Leave to File a Second Amended Complaint be and the same is hereby GRANTED, provided that plaintiff shall serve on the defendants within fifteen (15) days of the date of this order "core information" as follows:

A. The name and address of each person likely to have discoverable information that may bear significantly on any of the facts alleged in the Second Amended Complaint;

B. The description by category and location of all discoverable documents and other tangible items in the possession, custody or control of the Plaintiff that may bear significantly on any of the facts alleged in the Second Amended Complaint;

C. An itemization of any damages claimed by the Plaintiff, making available for inspection and copying documents or other evidentiary material bearing on the nature and extent of damages claimed;

D. The name and address of each person whom the Plaintiff experts to call as an expert witness at trial, the subject matter on which the expert is expected to testify and the name and address of the custodian of copies of any report prepared by the expert.

2. That the prior date for the completion of discovery, as to the defendants only, be and the same is hereby extended to close of business Friday, February 26, 1992.

3. That the prior date for the filing of motions for Summary Judgment or other dispositive motions be and the same is hereby extended to close of business Friday, March 12, 1992.

4. That plaintiff and deponents' Motion to Quash Subpoena is hereby GRANTED in part and DENIED in part with leave granted to defendants to proceed to take the testimony of the witnesses, Paul Weisenfeld, Esq. and John Conrad, Esq. by deposition upon written questions as provided by Fed.R.Civ.P.31.

5. That defendant Montgomery Medical Group's Motion to Compel be GRANTED IN PART AND DENIED IN PART as ordered in open court.

6. That defendant Montgomery Medical Group's Motion for Production of Documents be GRANTED IN PART AND DENIED IN PART as stated in open court.

/s/ James E. Kenkel
James E. Kenkel
U.S. Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

MEMORANDUM AND ORDER

(Entered July 7, 1993)

The Court has before it Defendants' Motion for Summary Judgment, Plaintiff 's Motion for Leave to File Supplemental Complaint and Third Amended Complaint and to Open Discovery, and all the materials submitted by the parties relating thereto. The Court has held a hearing and had the benefit of counsel's arguments.

I. BACKGROUND[1]

Plaintiff James L. Hooper ("Hooper") is a physician who, in 1964, founded Montgomery Medical Group, P.A.[2] (hereafter referred to as "MMG"), the corporate Defendant. Hooper served as corporate president until 1989.

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[1] In accordance with the summary judgment standard, the facts stated herein are as alleged by Plaintiff, the non-moving party.

[2] The corporation was first named Hooper and Kordon, P.A.; later became Deer Park Medical Group, P.A.; in 1986, became MMG; and, in April of 1993 became Perrino, Dolinsky, Karesh, Withrow, Juarbe & Baier, M.D., P.A.

In early 1989 the parties to this suit discovered that MMG had failed to meet its employment tax (including withholding) obligations and had developed a liability in excess of $1,000,000. All of the individual parties to this suit were "responsible persons" subject to personal liability for much of the corporate tax liability. 26 U.S.C. § 6672. MMG sought a loan to pay off the tax liability.

In May of 1989 Hooper resigned as MMG president because of his unhappiness with the treatment given an MMG employee and expressed his refusal to guarantee a corporate loan. Later in May, Hooper agreed to guarantee the corporate loan in return for an agreement that he would be president until the loan was satisfied.[3] Accordingly, Hooper was re-elected president in the summer or fall of 1989 and, in early 1990. Hooper and the individual defendants personally guaranteed and secured by their residences a loan from Potomac Valley Bank to MMG. The loan proceeds were used to pay the corporate tax liabilities.

In September of 1990, Dr. Withrow ("Withrow") was elected president of MMG. Hooper contends that this action was in violation of the agreement to retain him as president until the loan was satisfied. However, Hooper himself voted for Withrow in the election.

There were, obviously, bad personal relationships between Hooper and several MMG physicians. On October 17, 1990, Dr. Hooper sent a letter to MMG apologizing for his abusive behavior and promising to support Dr. Withrow's actions as MMG President.

On October 26, 1990, just nine days after his letter of apology, Dr. Hooper retained an attorney who sent

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[3] In accordance with the summary judgment standard, this is Hooper's version of the facts.

"non-negotiable" demands to MMG. It is unclear what came of these exact demands, although Plaintiff proceeded to obtain and participate in other employment despite an exclusive services contract with MMG that remained in effect. Subsequently, in April of 1991, Dr. Hooper submitted a letter stating that he would be on an unpaid leave of absence until the attorneys and accountants were able to arrange a suitable buy-out of his MMG stock; Dr. Hooper's letter emphasized that he was not resigning.[4]

Finally, on July 31, 1991, MMG held a Board of Directors meeting, at which time the Board voted to terminate Plaintiff 's employment contract. A letter dated August 20, 1991 was sent to Plaintiff notifying him that he would be officially terminated on October 19, 1991 (giving him sixty days' notice in accordance with his employment contract) and would remain on an unpaid leave of absence until that time.

On September 30, 1991, Plaintiff filed an EEOC charge alleging age discrimination. Plaintiff amended the charge to include a claim for retaliation on December 30, 1991. The present lawsuit was filed on February 24, 1992 and is now based on the Second Amended Complaint. Specifically, Plaintiff alleges: (1) age discrimination, (2) retaliation for filing a complaint with the Equal Employment Opportunity Commission, (3) breach of contract against MMG, (4) breach of contract against the individual defendants, (5) fraud against the individual defendants, (6) breach of fiduciary duty owed by the individual defendants, (7) conspiracy against the individual defendants and (8) ERISA violations.

The proffered Third Amended Complaint seeks to add claims relating to an April, 1993, transaction involving a sale

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[4] Plaintiff 's counsel conceded at oral argument that Dr. Hooper's leave was unpaid.

of MMG assets. It is apparent that if the Court should dismiss Counts I through VII then the new claims in the Third Amended Complaint should proceed, if at all, in state court.

II. LEGAL STANDARD

In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Supreme Court addressed in detail the analysis a court should use in considering a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Id. at 322-23.

This standard "mirrors" the standard for the directed verdict under Fed. R. Civ. P. 50(a), which provides that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Id.* at 250; Federal R. Civ. P. 50(a). In an ordinary civil case, "[t]he mere existence of a scintilla of evidence in support of the plaintiff 's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

On a motion for summary judgment, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, although the Court must view the evidence in the light most favorable to the non-moving party, Rule 56 does not relieve the non-movant of all responsibility to rebut the motion.

As Judge Winter said in *Bland v. Norfolk and Southern Railroad Company*, 406 F.2d 863, 866 (4th Cir. 1969):

> While a day in court may be a constitutional necessity when there are disputed questions of fact, the function of a motion for summary judgment is to smoke out if there is any case, *i.e.*, any genuine dispute as to any material fact, and, if there is no case, to conserve judicial time and energy by avoiding an unnecessary trial and by providing a speedy and efficient summary disposition.

More recently, in *Felty v. Graves-Humphrey Co.*, 818 F.2d 1126 (4th Cir. 1987), (quoting *Celotex, supra*, 477 U.S. at 323-24), Judge Wilkinson emphasized that trial judges have "an affirmative obligation ... to prevent 'factually unsupported claims and defenses' from proceeding to trial." 818 F.2d at 1128 (quoting *Celotex, supra*, 447 U.S. at 323-24).

III. SUMMARY JUDGMENT RULING

1. Count I - Age Discrimination

To establish a prima facie case of age discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*, Hooper must demonstrate that he is in the protected age group; that he was discharged or demoted;

that at the time of discharge or demotion, he was performing his job at a level that met his employer's legitimate expectations; and that he was replaced by an employee outside the protected class with comparable qualifications. *Conkwright v. Westinghouse Elec. Corp.* , 933 F.2d 231, 234 (4th Cir. 1991).[5] If Plaintiff establishes a prima facie case, Defendants then have the burden of presenting "a legitimate, non-discriminatory reason for" the action sued upon. *Id.* If this burden is met, and it is a low burden, Plaintiff has the ultimate burden of persuasion to establish that the reason offered by Defendants is pretextual and that the Defendants engaged in improper discriminatory conduct.

a. Plaintiff 's Prima Facie Case

It is undisputed that Hooper, over the age of 50, was a member of a protected class and, because this is the Defendants' Motion for Summary Judgment, the Court assumes at this point that he was discharged by MMG. The Court further assumes, in accordance with summary judgment standard, that Hooper was satisfactorily performing his job.[6] There is, however, no evidence that Hooper was replaced by anyone, much less a younger individual. The Court notes this fact as supporting Defendants' claim that Hooper was terminated for his abusive behavior. Thus, this Court is not certain that Plaintiff has met his burden of establishing a *prima facie* case. Nevertheless, for present purposes, the Court will assume Plaintiff has done so.

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[5] Plaintiff has specifically stated that he is not claiming age discrimination based on a demotion, namely his loss of the Presidency of MMG.

[6] There is considerable evidence that Hooper was not performing up to his employer's standard, including the October 17, 1990, letter written by Hooper apologizing for his abusive behavior. At this point, however, the Court will assume that his medical care of his patients met MMG's standards and, therefore, Hooper was performing adequately as a physician with MMG.

b. Defendants' Legitimate Business Reasons

Defendants argue that Plaintiff was not terminated because of his age but simply because of his poor behavior. He was abusive to employees, disrespectful of his colleagues, disdainful of policies and procedures, and generally behaved in a manner which was both hostile and destructive. Further, several of the individual defendant doctors believed that Dr. Hooper was self-dealing and negotiating certain financial arrangements for himself with others, arrangements which were contrary to his obligations to his employer, MMG.

There is ample evidence to support Defendants' position that Dr. Hooper was abusive to both employees and colleagues, starting with the letter of October 17, 1990, from Dr. Hooper himself apologizing for his abusive behavior and promising to cooperate in the future.

This Court finds that Defendants have more than sufficiently met their burden of articulation a legitimate non-discriminatory reason for Hooper's discharge.

c. Defendants' Reasons as Pretext

Plaintiff alleges that Defendants engaged in a plan to end Dr. Hooper's employment with the practice he founded as a result of his age. Plaintiff concedes that he is making no claim for age discrimination based on his loss of the

presidency of MMG to Dr. Withrow.[7] Rather, Plaintiff alleges that the loss of the presidency, the continued subsequent harassment an his eventual discharge form MMG all comprise the proscribed discrimination *See, Plaintiff 's Supplemental Memorandum in Opposition to Motion for Summary Judgment,* ¶ 1.

As specific evidence of discrimination, Plaintiff first cites comments by Dr. Dolinsky overheard while Dr. Dolinsky was on the telephone with some unknown party during September of 1990. The comments are: "[W]e voted Dr. Hooper's old ass out as President and now we have younger blood ... running the corporation ... It is just a matter of time until we get his old ass out completely." Rankin Dep., A.181.

The Court does not find this evidence sufficient to establish that the Defendant's proffered reasons were pretextual. One isolated comment made over the phone to an unknown party does not prove a claim of age discrimination. *Miller v. Beneficial Management Corp.*, 776 F. Supp. 936, 967-68 (D.N.J. 1991); *Gagne v. Northwestern Nat. Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989) (holding that isolated and ambiguous statements are too abstract and prejudicial to support a finding of age discrimination). Discovery is concluded. Plaintiff must produce more evidence than isolated or ambiguous statements to raise an issue of material fact. This comment simply does not indicate, in context, that Dr. Dolinsky's concern was with Dr. Hooper's age rather than

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[7] Even if Plaintiff were making a claim of age discrimination based on this loss of the presidency of MMG in September of 1990, such a claim would fail. While Plaintiff was a member of a protected class and replaced by a younger individual as President, Plaintiff himself voted for Dr. Withrow to be President of MMG and continued to work for MMG until April of 1991. At no time has Plaintiff asserted a claim for age discrimination based on demotion and there is simply no evidence of age discrimination based on the loss of the MMG presidency.

Dr. Hooper's management style, a style Dr. Hooper concedes was abusive. *See* Letter from Dr. Hooper of October 17, 1990. Additionally, this comment was made at the time Dr. Withrow was voted in as President, an action for which Plaintiff does not allege age discrimination and an action to which Plaintiff did not object. Further, even if considered meaningful, the September, 1990, statement was temporally far removed from an allegedly discriminatory act occurring a year or so later.

Two other comments are offered by Plaintiff as evidence of discrimination. In one comment it is suggested that Dr. Hooper was "getting close to retirement age" and in the other comment it is suggested that Dr. Hooper take emeritus status. *See Plaintiff 's Appendix to Opposition to Motion for Summary Judgment*, at 29; *Defendant's Appendix to Motion for Summary Judgment*, Part 8, at 18. Dr. Hooper argues that these comments demonstrate the discriminatory motive on the part of all Defendants. The Court disagrees. Neither of these comments indicates that Dr. Hooper was being terminated as a result of his age. These comments more likely demonstrate that Dr. Dolinsky recognized the problems Dr. Hooper's abusive behavior created in the office and wished to find a workable solution to the situation short of termination, a solution that would involve Dr. Hooper voluntarily changing his work status with MMG. Isolated or ambiguous statements are insufficient to establish a claim of age discrimination at this time. *See, Gagne, infra.*

The three comments referred to above are the only evidence Plaintiff offers to establish that Defendants' offered business reason for its actions are pretextual. These three comments, taken in context, establish only that there was a long-standing disagreement between parties. The comments do not establish that Plaintiff was discriminated against because of his age. In light of the fact that Dr. Hooper was not replaced by *anyone*, much less a younger individual, and

that the Defendants have produced evidence demonstrating that they acted based on Dr. Hooper's poor behavior, the Court finds that Plaintiff 's evidence is insufficient at this stage to raise a genuine question of material fact. Plaintiff has failed to present evidence from which a reasonable jury could find, despite having all inferences being drawn in his favor, that Defendants actions were motivated by Plaintiff 's age.[8]

2. Count II - Retaliation

Plaintiff claims that Defendants unlawfully retaliated against him for filing his claim of age discrimination with the EEOC. To establish a claim of retaliation, Plaintiff must demonstrate that: (1) he was engaged in protected activity; (2) the employer was aware of the protected activity; (3) the employer took adverse action against the employee engaged in protected activity; and (4) there is a casual connection between the adverse action and the protected activity. *See Lewis v. AT&T Technologies, Inc.*, 691 F. Supp. 915, 921-22 (D.Md. 1988).

Plaintiff filed a claim with the EEOC on September 30, 1991, which is protected activity, and Defendants acknowledge they learned of the EEOC charge. Assuming the facts most favorable to Plaintiff, Plaintiff was officially terminated as of October 19, 1991. To establish a causal connection in this case, any actions of retaliation against Plaintiff must have occurred within those nineteen days.[9] The

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[8] Further, even assuming that Plaintiff 's evidence established that age was a motivating factor in Dr. Hooper's termination, Defendants' have proven that the same decision would have been reached if age had not been a factor. *See Price Waterhouse v. Hopkins*, 490. U.S. 228,258 (1989).

[9] Because the Court treats Plaintiff as an employee until October 19, 1991 it need not resolve the issue of retaliation against a former employee.

Court addresses each action that Plaintiff alleges as retaliation in turn.

Plaintiff first alleges that Defendants deviated from standard policy by not allowing Dr. Hooper to notify his patients that he was leaving MMG. Dr. Hooper first requested this access to his patient files in early October of 1991. Defendants did not allow Plaintiff access because the panel of patients, as it is referred to by both parties, belongs to MMG and MMG has not itself allowed a doctor access to such information once the employment relationship is terminated. Defendants acknowledge that other physicians have had access to the information in the past but not as a result of actions taken by MMG, i.e., the Defendants did not know how the other physicians came to possess the information. Plaintiff does not dispute this claim. Thus, the Court cannot find that there was an established norm of allowing a physician access to the patient information once the physician ceased to work for MMG.

More importantly, the timing of the request for patient information was controlled by Plaintiff. Had he asked for the information prior to the filing of the EEOC complaint, he would have been denied access to the information at that point and there would be no claim for retaliation. Plaintiff is essentially alleging retaliation under these circumstances based solely on the timing of the request, timing that was within Plaintiff 's control. Thus, there is no causal connection between the filing of the EEOC claim and the denial of access to the patient information; rather, there is only a coincidence in timing that was controlled by Plaintiff.

Second, Plaintiff alleges that MMG failed to pay for Dr. Hooper's malpractice insurance and that the first non-payment occurred after September 30, 1991. There is no factual evidence in the record to support this claim, a point conceded by Plaintiff 's counsel at oral argument. With no

facts to support this allegation and discovery closed, summary judgment for Defendants on this claim is appropriate.

Last, Plaintiff alleges that he was banned from MMG's premises and refers to Dr. Perrino's deposition for evidentiary support.[10] *See, Plaintiff 's Appendix to Opposition to Motion for Summary Judgment*, at 157. Dr. Perrino referred to a letter in his deposition which states that Dr. Hooper is not to enter the building. There is, however, no date on the letter and Plaintiff cannot recall whether or not the letter was received after the EEOC charge was filed. Thus, there is no factual evidence to support this allegation and summary judgment is appropriate for Defendants on this claim.[11]

3. Count III - Breach of Contract by MMG

Plaintiff 's third claim is for breach of contract by MMG. In April of 1991, Plaintiff submitted to Dr. Withrow a letter stating that effective April 24, 1991, he would be on a leave of absence "while the attorneys, accountants and Board of Directors work out an acceptable buy out of [his MMG] stock." *See, Letter from Dr. Hooper to Dr. Withrow*, April 18, 1991. The letter also states "[t]his is *not* a resignation." (emphasis in original). Plaintiff contends that this letter constituted a contract between Plaintiff and Defendants to

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[10] Plaintiff, through his counsel at oral argument, withdrew his retaliation claims based on Defendants' alleged refusal to pay Dr. Hooper for his last sixty days' employment (from August 20, 1991 through October 19, 1991) and Defendants' Notification to HMOs and Hospitals of Dr. Hooper's Termination of his affiliation with MMG, a letter dated August 23, 1991.

[11] Further, Dr. Hooper was given sixty days' notice of his termination in a letter dated August 20, 1991. It is appropriate to ban an individual who is, for all practical purposes as a result of an unpaid leave of absence, an ex-employee from that point forward. This action alone, under the circumstances of this case, would not serve as a basis for a retaliation claim.

keep Dr. Hooper on an unpaid leave of absence until this buy-out occurred and to bargain in good faith. Plaintiff contends that both Plaintiff and Dr. Withrow, as MMG's President, signed the letter, which contains all essential contract terms. Plaintiff alleges that Defendants breached this agreement by terminating Dr. Hooper and never negotiating in good faith.

The Court finds that there is no evidence that Dr. Withrow's signature indicated acceptance of its terms, whatever those may be, rather than acknowledge most of receipt [*sic*]. In fact, Dr. Withrow's deposition testimony and the context establish the latter. *See* Affidavit of Dr. Withrow, at 43-44.

Dr. Hooper was employed pursuant to a written contract dated July 25, 1986. As a part of this employment contract, *inter alia*, are two clauses requiring any superseding agreement to be in writing and requiring MMG to give Dr. Hooper sixty days' notice of termination. Plaintiff, through counsel at oral argument, argues that the agreement of April, 1991, supplemented, rather than superseded, the employment contract. The Court does not agree. There is simply no way to claim this letter (even when viewed most favorably to Hooper) would supplement, rather than supersede, the employment contract. The employment contract enables MMG to terminate Plaintiff at any time with sixty days' notice while the letter (according to Hooper) requires MMG not to terminate Plaintiff while Plaintiff 's stock buy-out is negotiated. These are contradictory terms. Thus, the Court concludes that this letter does not constitute a contract between Plaintiff and Defendants.

Even assuming this letter did constitute an agreement, it was at most an agreement to consider Dr. Hooper on leave of absence (rather that having resigned) when he ceased coming to work. Nothing in the letter, which Plaintiff indicates

in his deposition constitutes the whole of the contract terms, [12] modifies the employment contract which enabled MMG to terminate Dr. Hooper on sixty days' notice.[13] Thus, this Court finds that, at best, any agreement did not involve the promise to employ Dr. Hooper indefinitely but only to consider him as an employee on leave of absence when he stopped reporting to work.[14] There was no promise by MMG not to terminate Dr. Hooper and no modification of MMG's right to do so in accordance with the employment contract.

4. Count IV - Breach of Contract by the Individual Defendants

Plaintiff contends that there was an oral contract between Defendants Karesh, Dolinsky, Perrino, Baier and Juarbe to retain Dr. Hooper as President of MMG until such time as MMG's loan with Potomac Valley Bank was paid in full. Dr. Hooper contends that this promise was a condition he insisted upon before he would personally guarantee the loan and use his home as collateral for the loan.

There is no "hard" evidence supporting Hooper's claim that there was an oral agreement. The Court must note that it is doubtful that, even on the summary judgment standard, Hooper has presented evidence to support a finding that the oral agreement existed; the circumstances plainly indicate that there was no such agreement.

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[12] *See* Dr. Hooper's first deposition, at 158-59.

[13] Plaintiff 's counsel conceded at oral argument that Dr. Hooper could have returned to MMG on any given day and been fired with sixty days' notice the moment he walked into the office.

[14] Based on this conclusion, the Court finds it unnecessary to determine whether or not there was a promise to bargain in good faith -- the Court simply does not find that there was an agreement to buy out Dr. Hooper's MMG stock.

First, Dr. Hooper was not the only individual who personally guaranteed the loan nor was he the only MMG Physician to use his home as collateral for the loan. All the MMG physicians personally guaranteed the loan and three, including Dr. Hooper, used their homes as collateral. Thus, there is no evidence that either Dr. Hooper's guarantee or the value of his home was necessary to secure the loan.

Second, Dr. Hooper was jointly and severally liable for the tax liability that created the need for the loan. Dr. Hooper received the same benefit as the other MMG physicians by securing the loan because the IRS could have place a lien against Dr. Hooper's home if MMG did not pay off the tax liability. Dr. Hooper had no choice -- he either had to enter into the load agreement or pay the tax liability himself.

Third, the terms of the alleged agreement are illogical. Based on Hooper's version of the facts, there was an oral contract to retain him as President while the written employment contract remained in effect. Under the written agreement, MMG could terminate Dr. Hooper at any time with sixty days' notice. Thus, under Hooper's scenario, he could remain President of MMG while not employed by MMG. This makes no sense.

The Court concludes that Hooper has not, in view of all of the relevant evidence, presented enough evidence to support a finding that there was an oral agreement as alleged. Even if there could be a finding that there was such an oral agreement, however, Hooper's claim must fail because this oral contract to retain Dr. Hooper as MMG President was modified when Dr. Hooper joined the individual defendants in voting for Dr. Withrow as the new President of MMG at the September, 1990, Board of Directors meeting. Furthermore, Hooper waived any right he may have had to seek enforcement of the alleged agreement to retain him as

President until the loan was paid off when he voted for his replacement. *See, e.g., Fairchild Strators Corp. v. Siegler Corp.*, 225 F. Supp. 135 (D.Md. 1963) (failure to object to issue jeopardizes right to claim breach as to that matter); Md. Corps. & Ass'ns Code Ann. § 2-410(b) (1993) ("The right to dissent does not apply to a director who: (1) voted in favor of the action")

In view of the foregoing, summary judgment will be entered for Defendants on Count IV.

5. Count V - Fraud

In Count V of the Second Amended Complaint, Plaintiff alleges that the individual Defendants named in Count IV made the promise to retain Dr. Hooper as President of MMG fraudulently. Specifically, Dr. Hooper maintains that each individual Defendant made the promise to Dr. Hooper but intended to replace him as President after he pledged his home for the loan, that Dr. Hooper relied on the promises of these Defendants as an inducement to pledge his home as collateral for the loan, he would not have pledged his home absent such a promise and that the conduct of the Defendants was "willful, knowing, malicious, and fraudulent." Second Amended Complaint, ¶ 53.

In order to establish a cause of action for fraud, Plaintiff must establish: "(1) that a representation made by a party was false; (2) that either its falsity was known to that party or the misrepresentation was made with such reckless indifference to truth to impute knowledge to him; (3) that the misrepresentation was made for the purpose of defrauding some other person; (4) that that person not only relied upon the misrepresentation but had the right to rely upon it with full belief of its truth, and that he would not have done the thing from which damage resulted if it had not been made; and (5) that that person suffered damage directly resulting from the

misrepresentation." *B.N. v. K.K.*, 312 Md. 135, 148, 538 A.2d 1175, 1182 (Md.. 1988) (citation omitted).

The Court finds no evidence of an intent on the part of the individual Defendants not to abide by the oral agreement, assuming it was made, to retain Dr. Hooper as President of MMG at the time such a promise was made. To establish fraud, Plaintiff must produce evidence that the Defendants did not intend to keep their alleged promise at the time their promise was made. It is insufficient for Hooper to argue that a year and a half after the promises were made, there was a breach of the promise. That is only an allegation of breach of contract.

Furthermore, there is no evidence of detrimental reliance on Dr. Hooper's part. The fact is that Dr. Hooper never suffered any loss due to the use of his credit to secure the loan. The loan was never in default, the loan is now fully repaid, and Plaintiff never attempted to borrow against any portion of the value of his home, neither against the $170,000 in unencumbered equity nor the encumbered portion. Accordingly, Dr. Hooper has not established any detrimental reliance on his part.

Moreover, Plaintiff has presented no evidence of any damages. Plaintiff may have suffered from the alleged fraud and proof of harm is an element of the tort. Hooper argues that his damages are the difference in the interest rate available for a secured versus an unsecured loan. The Court disagrees. Hooper secured the benefit, not the detriment, of the lower interest rate. Also, at least two of the Defendant physicians secured the loan with their own homes so that Hooper's collateral was not the sole cause for MMG obtaining the lower interest rate available for secured loan.

Hooper also argues that the value of being able to obtain a loan versus the consequences of not obtaining a loan

can be the measure of damages here. However, Hooper was jointly and severally liable with the individual Defendants for MMG's tax liability. If Hooper had not participated in securing the corporate loan to repay the tax liability, he faced personal joint and several liability. Hence, he *benefited* from the loan to the same extent - if not more - than the individual Defendants.

Finally, the Court must again note that Hooper voted to have Withrow replace him as president. Hence, Hooper himself participated or acquiesced in the alleged fraud.

For the foregoing reasons summary judgment will be granted on Count V.

6. Count VI - Breach of Fiduciary Duty

Plaintiff alleges that at all relevant times, Dr. Hooper and the individual Defendants referred to themselves as "partners" in a close corporation. Accordingly, Plaintiff alleges that certain actions by Defendants breached the fiduciary duties owed as shareholder/"partners" in a close corporation to Plaintiff and that they failed to deal in good faith with Plaintiff. Second Amended Complaint, ¶ 61. The actions include "denying Plaintiff office keys, ordering him to vacate his office, writing sarcastic memos, encouraging and soliciting MMG employees to complain about Plaintiff, seeking to force Plaintiff to work in a satellite office, and otherwise seeking to humiliate and embarrass Plaintiff." Second Amended Complaint, ¶ 58. Additionally, Plaintiff complains that Defendants excluded Plaintiff from meetings and met secretly away from MMG premises in order to make corporate policy and plan actions against Plaintiff. Such meetings included consultations with counsel to MMG from which Plaintiff, a member of the Board of Directors, was excluded and which were kept secret from him. *Id.*

First, it is important to not that MMG was organized as a Maryland corporation, not as a close corporation nor as a partnership, where there would be fiduciary duties as alleged. It is well-settled in Maryland that directors owe a fiduciary duty to the corporation and its shareholders. *Toner v. Baltimore Envelope Co.*, 498 A.2d 642 (Md. 1985). The fiduciary duties that bind directors of a corporation are to protect the corporation and its shareholders from a director taking financial advantage of his or her position as a director.[15] As a result, "directors must demonstrate the financial fairness of transactions between themselves and the corporation. Directors may not waste corporate assets. Directors must prove a proper corporate purpose for, and the fairness of, exchanges and issuances of stock affecting corporate funds and control." *Id.*, at 648 (citations omitted). There is, however, no general fiduciary duty between stockholders nor is there a general fiduciary duty between Directors.[16] For that reason, any actions by Defendants in denying plaintiff access to MMG's premises (i.e., denial of office keys and/or changing Plaintiff 's office against his wishes) or making MMG a generally unpleasant place for Plaintiff to practice medicine are neither illegal nor violations of some generalized fiduciary duty which Plaintiff claims he is owed.

Plaintiff further argues that MMG is small like a partnership and conducted itself as if it were a close corporation or partnership. Therefore, Plaintiff argues, the

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[15] Directors' fiduciary duties to the corporation and its shareholders include an obligation to avoid conflicts of interest and self-dealing, and to act in the best interest of the corporation. These fiduciary obligations, however, do not include an obligation to behave in a friendly manner.

[16] There are Maryland cases which have recognized the fiduciary obligation of majority shareholders, in certain matters involving share repurchase, to minority shareholders. This situation is not presented here, nor has Plaintiff based his claim on fiduciary duty on such a circumstance. *See Toner v. Baltimore Envelope Co.*, 498 A.2d 642, 647-48 (Md. 1985)

fiduciary duties among partners are applicable to this case and, accordingly, there is a general fiduciary duty owed between the directors and between the shareholders of MMG. The Court disagrees. There is no legal bases for imposing a fiduciary duty upon the Defendants to behave nicely towards Hooper. The size of the corporation simply is not determinative of the corporation's status. The Court has neither found any nor been directed by counsel towards any Maryland case law indicating that partnership duties should be imposed on closely-held corporations. In this case, MMG conducted all activities as a regularly formed corporation - - it held Board of Director's meetings, maintained all corporate books, maintained corporate minutes, elected officers and Directors, and received the legal benefits of corporate status. There is simply no reason to impose partnership status on these Defendants, who have behaved in a cooperate manner and have held themselves out to the public in a corporate form.

7. Count VII - Conspiracy

Plaintiff alleges that there was a conspiracy among the individual Defendants to carry out the objectives stated in Count VI of the Second Amended Complaint. Under Maryland law, civil conspiracy is not a free-standing claim, but is dependent on Plaintiff 's ability to establish the substantive claim in Count Six. *Yousef v. Trust Bank Sav. F.S. B.*, 81 Md. App. 527, 538, 568 A.2d 1134, 1139 (1990) ("The agreement to commit an unlawful act or use unlawful means to accomplish a lawful act is not, by itself, sufficient to establish a claim for civil conspiracy"). This Court has ruled against Plaintiff on the substantive claim and, therefore, will enter

summary judgment for Defendants on this Count.[17]

8. Count VII - ERISA Violation

In this Count, Plaintiff alleges that MMG failed to provide to him pension plan benefits pursuant to the Employee Retirement Income Security Act ("ERISA"). Specifically, Dr. Hooper alleges that interest income is due to him on a pension plan account that was formerly maintained on his behalf by MMG. The pension plain was terminated in July of 1990 and the monies were distributed in December of 1990. Earnings on the funds were not paid for a five month period - - July 31, 1990 through December 21, 1990. In conjunction with this Count, Dr. Hooper requests that he be awarded attorney's fees.

Defendants state that Plaintiff 's claim to interest due him was mooted before the Count was even filed. In support of this argument, Defendants state that Dr. Hooper has been offered the amount of the interest due him, that counsel for MMG has supplied Plaintiff with certain information requested by Plaintiff to confirm these interest income calculations, and to date, Dr. Hooper has simply failed to accept the money offered.

The Court finds that there remains a dispute regarding the computation of the interest income due to Dr. Hooper. Plaintiff maintains that while Dr. Hooper was provided information demonstrating how Dr. Hooper's interest earned was calculated, he has not been provided with figures to verify the amount of Dr. Hooper's share of the pension plan. *See* Letter form Plaintiff 's Counsel to Judge Garbis, May 24, 1993. Therefore, while the Court remains hopeful that the

[17] In fact, the Court has ruled for Defendants on each of substantive claims in Counts One through Six. Thus, Plaintiff 's conspiracy allegation would fail regardless of the Count on which he based the conspiracy allegation.

parties will resolve this dispute, the Court cannot resolve the existing factual questions on motions for summary judgment. Furthermore, the determination of whether Plaintiff is entitled to an award of attorney's fees is not now capable of resolution on summary judgment.

VI. AMENDED COMPLAINTS

1. Second Amended Complaint

The record may not contain an Order expressly granting the Plaintiff leave to file the Second Amended Complaint. However, the parties have proceeded, justifiably, as if leave had been granted for its filing. Under the circumstances, the Court will, formally grant the Plaintiff leave to file to insure that the record is clear.

2. Third Amended Complaint

The proffered Third Amended Complaint would add to this case claims arising from a transaction involving the sale of MMG's assets that occurred in April of 1993. The new Counts might have sufficient relationship to Counts I through VII to warrant permitting the amendment. The new claims, however, have no substantial (if any) relationship to Count VII (ERISA). Accordingly, the new claims - to the extent they are of merit - can be, and should be, the subject of a separate state court action.

V. CONCLUSION

For the foregoing reasons:

1. Plaintiff 's Motion for Leave to File Second Amended Complaint is **GRANTED**.

2. Defendants' Motion for Summary Judgment is:

a. **GRANTED** as to Counts I through VII inclusive.

b. **DENIED** as to Count VIII.

3. Plaintiff 's Motion for Leave to File Supplemental Complaint and Third Amended Complaint, and to Open Discovery is **DENIED**.

4. By July 30, 1993, Plaintiff shall either submit an agreed proposed Order rescheduling further proceedings herein or arrange a telephone conference for this purpose.

SO ORDERED this 30th day of June, 1993

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

MEMORANDUM AND ORDER

(Entered November 17, 1993)

The Court has before it Plaintiff 's Motion For Partial Vacation Of Order Of June 30, 1993, Defendants' Motion for Further Sanctions and the material submitted by the parties relating thereto. The Court also has a letter of November 5, 1993 from counsel for Defendants which shall be treated as an informal Motion for Entry Of Judgment together with Plaintiff 's response thereto. The Court finds that a hearing is unnecessary.

The Court includes by reference herein the Memorandum Of June 30, 1993 (the "First Decision") as background. As set forth more fully in the First Decision the Plaintiff brought the Defendants into federal court by asserting age discrimination and ERISA claims and appended to the federal causes of action various state law claims including Count VI based on a theory of breach of fiduciary responsibility. For reasons set forth in the First Decision, the Court granted summary judgment for the Defendants on all Counts other than the ERISA count.

I. Motion For Partial Vacation Of Order

Plaintiff and his counsel brought a breach of fiduciary duty claim into federal court and put the Defendants to the expense of discovery and presentation of a motion for summary judgment in response to Plaintiff 's claim. The Court has ruled that the claim is without merit. Now, the Plaintiff seeks to have this Court - after the matter has at great expense been presented and decided against him - exercise discretion to decline jurisdiction over the subject claim.

Plaintiff now wishes to be able to present his breach of fiduciary duty claim all over again in state court, with a new judge and, presumably a new round of expensive proceedings. The Plaintiff 's motion is beyond frivolous and well into the area of utterly outrageous.

Plaintiff chose this Court as the forum to consider his breach of fiduciary claim. This Court has considered the claim and found it meritless. This Court sees no reasonable basis for it to consider exercising discretion to decline jurisdiction and allow the Plaintiff to cost the Defendants even more in legal fees by litigating the same claim in another court.

II. Sanctions

Defendants seek sanctions against Plaintiff 's counsel for filing the subject motion. Rule 11, Federal Rules of Civil Procedure. Under Local Rule 105.8 the Court may not impose sanctions prior to directing Plaintiff 's counsel to provide a response to the motion. This will be done.

III. Judgment

It is apparent that the Defendants are entitled to have a Judgment Order entered in this case even if motions for sanctions and fees are not yet fully resolved. Accordingly, a

separate Judgment Order will be entered. Said Order will reflect that, to the extent it may be necessary to do so, the Court is exercising authority under Rule 54(b) to enter a final judgment regarding some, but not all, of the matters pending herein.

It should also be noted that the Judgment Order will include an award of costs to the Defendants. Anticipating the Plaintiff 's motion seeking an alteration, it is best to address the matter at this point. It is true that the Plaintiff would consider himself to have prevailed as to Count VIII because he received full payment of the amount which he claimed was due with respect to that Count. However, the Court does not find this happenstance adequate - in the context of this case - to warrant costs for the Plaintiff or to warrant a withholding of an award of costs for the Defendants. The fact that there was included in this law suit a relatively minor claim which the Defendants did not consider worth the cost of litigation does not, in this Court's view, justify the withholding of an award of assessable costs against the Plaintiff. Therefore, there will be an award of assessable costs. The matter of sanctions and legal fees remains pending.

IV. Conclusion

For the foregoing reasons:

1. Plaintiff 's Motion for Partial Vacation Of Order of June 30, 1993 is **DENIED**.

2. By November 30, 1993:

> a. Plaintiff 's Counsel, Allen H. Sachsel, Esquire, shall respond to Defendants' Motion seeking further sanctions for his signing

Plaintiff 's Motion For Partial Vacation Of Order Of June 30, 1993 and the memoranda submitted therewith.

b. Defendants shall submit a statement, including an affidavit with supporting evidence, of the costs incurred in responding to said motion.

3. By December 14, 1993 Mr. Sachsel and Defendants may each file a response to the November 30, 1993 filings required herein.

4. Judgment shall be entered by separate Order.

SO ORDERED this 15th day of November, 1993.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

CORRECTED JUDGMENT ORDER

(Entered November 23, 1993)

By separate Order issued June 30, 1993, the Court has granted the Motion For Summary Judgment filed by the Defendants with respect to all Counts other than Count VIII of the Amended Complaint. The Court has been advised that, by virtue of payment of the disputed amount, Count VIII is moot. There remains pending only the parties' respective motions for legal fees and sanctions.

To the extent that the pendency of motions for fees and sanctions might be an impediment to the entry of a Judgment Order, the Court finds that there is no just reason for delay and that there are valid affirmative reasons for the prompt entry of a Judgment Order as to resolved matters. Accordingly, the Court hereby directs that a final judgment be entered. This action is taken pursuant to Rule 54(b) of the Federal Rules of Civil Procedure to the extent that such Rule may be here applicable.

Accordingly:

1. Judgment shall be and is hereby entered in favor of Defendants Montgomery Medical

Group, P.A., Susan Withrow, M.D., Charles Karesh, M.D., Steven Dolinsky, M.D., Pasqual Perrino, M.D., Carolyn Baier, M.D., and Herbert Juarbe, M.D. against Plaintiff James L. Hooper, M.D.

2. Judgment with respect to the ERISA claim in Count VIII (and only that claim) is entered because the asserted liability was paid in full rendering the Count moot.

3. Judgment with respect to all other claims is entered by virtue of an adjudication in favor of the Defendants and against the Plaintiff.

4. The Defendants are awarded all of their assessable costs.

SO ORDERED this 17th day of November, 1993.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,
v.
MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

MEMORANDUM AND ORDER

(Entered November 30, 1993)

The Court has before it Defendants' Motion for Attorneys' Fees and Costs and Plaintiff 's Motion for Attorney's Fees for Count VIII and the materials submitted by the parties relating thereto. The Court finds that a hearing is unnecessary.

DEFENDANTS' MOTION

In its Second Amended Complaint, Plaintiff presented eight Counts. As detailed in the Memorandum and Order issued June 30, 1993 (the "Decision"), the Court granted the Defendants ("MMG") summary judgment as to the first seven Counts. Count VIII, based upon ERISA, was rendered moot by payment of the amount claimed.

Defendants seek sanctions under Rule 11 of the Federal Rules of Civil Procedure for the actions of Plaintiff 's counsel in signing the Second Amended Complaint and the submissions in opposition to summary judgment with regard to Counts I through VII.

Rule 105.8 of the Local Rules of this Court provides:

> Unless otherwise ordered by the Court, a party need not respond to any motion filed under Fed. R. Civ. P. 11 or 28 U.S.C. § 1927. The Court shall not grant any motion without requesting a response.

Md. Dist. Ct. R. 105.8(b).

In accordance with Rule 105.8, Plaintiff and his counsel, Allen H. Sachsel, Esquire, were directed to respond to the Defendants' motion seeking sanctions. A response has been filed.

Rule 11 of the Federal Rules of Civil Procedure provides, in pertinent part that:

> The signature of an attorney ... constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. ... If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred

> because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Fed. R. Civ. P. 11.

The Court's rationale for granting summary judgment as to each of Counts I through VII has been set forth in the Decision and need not be repeated here. A review of its ruling, the underlying filings, and the response to the pending motion for sanctions does not change the Court's view of the result reached in the Decision. Nor do these materials lead the Court to conclude that the positions taken by Plaintiff and his counsel were "well grounded in fact ... warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." Fed. R. Civ. P. 11. Moreover the Court cannot conclude that the positions taken were not "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Id. Indeed, it is this Court's abiding conviction that this case was pursued by the Plaintiff, with the knowing assistance of his counsel, with a purpose of costing the Defendants as much as possible to defend against it.

Plaintiff 's counsel has proven to be a creative attorney. However, he must have known, or certainly should have known, that the positions taken herein were beyond the limits allowed by Rule 11. The assertion of an age discrimination claim -- brought for the purpose of getting the case into federal court in the first place -- was based upon the flimsiest of justifications. Following discovery -- if not before -- Plaintiff 's counsel had no reasonable basis for pursuing this claim.

The retaliation claim had no substance. The contract claims are based upon what can be most charitably described as an unrealistic view of the evidence. The fraud claim is

baseless altogether. The breach of fiduciary duty claim -- although novel since it has not specifically been rejected by a Maryland precedent -- is also without even arguable merit. The conspiracy assertion is, necessarily, dependent upon and of no greater value than the substantive claims on which it is based.[1]

In this case, the Court finds that Plaintiff 's counsel did not meet the Rule 11 standard with regard to his assertions and defenses against summary judgment of each and every one of Counts I through VII. Moreover, it is apparent to the Court that this action was filed and pursued without regard to the merit, or lack thereof, of Plaintiff 's claims. While Plaintiff may have had some glimmer of hope[2] that some of the Counts might survive summary judgment, the Plaintiff also intended to, and regretfully has succeeded in, causing the Defendants as much expense and inconvenience as possible in defending this action.

The Defendants have sought sanctions against Plaintiff and his attorney. The Court will not undertake to ascertain whether sanctions can or should be imposed on the Plaintiff himself. From all appearances, Plaintiff relied on his counsel and not vice versa. It is readily apparent that Plaintiff 's counsel, by signing the aforementioned documents, is subject to Rule 11 sanctions. Thus, sanctions will be imposed on counsel. The extent to which Plaintiff 's counsel believes that

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[1] Plaintiff 's counsel states that, at argument, the Court said that "there no doubt was a conspiracy." Assuming (in the absence of a transcript) that this is what was said, it is appropriate to make clear what was meant. That is, there is no doubt that the actions of the Defendants could be said to have been jointly undertaken. However, none of those actions gave rise to a valid cause of action for the Plaintiff.

[2] But, counsel should have had no realistic hope.

the Plaintiff himself should bear, or share in, those sanctions is a matter for them to resolve among themselves.

The Defendants have submitted evidence that, they contend, would support a determination that the Plaintiff 's sanctionable action has cost them well over one hundred thousand dollars. However, it is not necessary that the sanction reimburse the victims for their costs. Indeed, the United States Court of Appeals for the Fourth Circuit has stated that the district court should impose "the least severe sanction adequate to accomplish the purpose of Rule 11." *In re Kunstler*, 914 F.2d 505, 522 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1607 (1991); *see also Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir. 1987). The Supreme Court has stated " 'Rule 11 is not a fee-shifting statute.' " *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 111 S. Ct. 922, 934 (1991) (quoting *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2462 (1990)). While compensation of a Rule 11 victim is an appropriate consideration, the primary purpose of the Rule is to deter future litigation abuse. *Kunstler*, 914 F.2d at 522. The Court need not equate a "reasonable sanction" with an amount equaling "actual expenses and attorney's fees." Id. at 523 (quoting *Fahrenz v. Meadow Farm Partnership*, 850 F.2d 207, 211 (4th Cir. 1988)).

Here, even if an appellate court were to disagree with this Court as to the imposition of sanctions regarding Count VI[3] or some other Count,[4] the bottom-line result would remain the same. Plaintiff 's counsel has pursued at least several Counts in violation of Rule 11. Accordingly, the sanction amount -- being in this Court's judgment the least adequate to carry out the purpose of Rule 11 -- is being set at the same

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[3] Because of the novelty of the legal position taken.

[4] On a basis this Court cannot now foresee.

level as would be imposed if Count VI (or even one or two other Counts) were not subject to sanctions.

While necessarily a matter of discretion, the Court concludes that a sanction of Five Thousand Dollars is appropriate. This sum -- though by no means adequate to reimburse the victims of the violation -- is sufficient to be meaningful to Plaintiff 's counsel and will serve to make him and others desist from further Rule 11 violations

PLAINTIFF 'S MOTION

Plaintiff has moved for legal fees with respect to Count VIII of the Second Amended Complaint. In brief, Plaintiff found an arguable bases to question the computation of the amount to be distributed to him from the Pension Plan administered by Defendant MMG. Plaintiff 's counsel sent a letter, dated September 10, 1992, advising of Plaintiff 's position. In response, MMG took the position that its computations were correct. Through December 3, 1992 there were communications in which each side sought to persuade the other to concede altogether. Plaintiff 's counsel sent a letter on December 3, 1992, setting a deadline of December 7th for a meeting to resolve the matter. In response, on December 7, 1992, Defendant's counsel sent (by fax) a letter advising that a meeting on December 7th (that date) was impossible but that he would meet with MMG "in the near future" to consider Plaintiff 's request and "a final response [will be] provided to [Plaintiff 's counsel]."

On December 17, 1992, Plaintiff filed a motion seeking leave to file a Second Amended Complaint including Count VIII, the ERISA Count herein. By letter of the same date, counsel for MMG expressed surprise at the receipt of the ERISA claim in the Second Amended Complaint and, in effect, indicated an intent to pursue discussions to resolve the ERISA dispute. Thereafter, MMG decided that, in view of

the amount at issue, it was not sensible to incur the expense of litigation of the claim. On January 14, 1993, MMG took formal action to agree to Plaintiff's method of computation.

It appears that, despite the January 14, 1993 action, Plaintiff's counsel was not advised of MMG's concession until counsel were about to enter the Courtroom on January 27, 1993, to present argument on Plaintiff's motion to amend the Complaint to add the ERISA Count.

The United States Court of Appeals for the Fourth Circuit has found the following criteria pertinent in deciding whether to award fees in an ERISA case: (1) the degree of culpability or bad faith of the party resisting the claim; (2) the ability of the opposing party to pay; (3) the deterrent effect of the award; (4) whether the party seeking the fee sought to benefit others or resolve a significant legal question; and (5) the relative merits of the parties' positions. *Reinking v. Philadelphia Am. Life Ins. Co.*, 910 F.2d 1210, 1217-18 (4th Cir. 1990), *overruled on other grounds by Quesinberry v. Life Ins. Co. of North Am.*, 987 F.2d 1017 (4th Cir. 1993). The *Quesinberry* court clarified that, while the awarding of fees under ERISA is discretionary, there is no mandatory presumption in favor of the prevailing insured. *Quesinberry*, 987 F.2d at 1029-30.

In this case the factors, while closely balanced, do tip slightly in favor of the Plaintiff who is, in view of the Defendants' payment of the amount in dispute, the prevailing party.

There was no bad faith in regard to the Defendants' original substantive position and the Court cannot determine which side actually had the better case. The Defendant here made the decision that the amount in issue did not warrant its incurring the expense to litigate what appears to have been a fairly debatable issue. The Defendant certainly has the ability

to pay a fee in this case. The Plaintiff filed the case in his own self-interest even though the result may be to benefit others. Finally, there inevitably will be a determent effect of a fee award in that the award will influence other defendants to take action to avoid such fee awards.

Here, the Court would not have imposed a fee were the Defendant to have simply co ·ded the case reasonably soon after being served with the proffered Second Amended Complaint. After all, the record does not establish that the Defendants were being unreasonable or unduly tardy in seeking to provide information to the Plaintiff to convince him of the correctness of MMG's computation. Plaintiff 's counsel was sufficiently "quick on the trigger" in regard to filing the ERISA count to warrant denial of a fee award up to the point of filing and a reasonable time thereafter. Moreover, it may well have been reasonable -- taking into account the time of year[5] -- for the Defendant to have delayed until early January to have reached a final decision to concede the issue. However, the last stage of the delay in conceding the case is inexcusable. Once the decision was made, on January 14, 1993, to agree to the Plaintiff 's computation, the Defendants should have told the Plaintiff. There was no further justification for requiring the Plaintiff to incur any fees or expenses in supporting his ability to present, and the correctness of, his position regarding the computation. Under the circumstances, then, the Court will exercise its discretion to award the Plaintiff legal fees with regard to Count VIII.

The amount of the fees to be incurred is a matter of this Court's discretion. This Court does not accept the Plaintiff 's suggestion that he is entitled to fees going back to the beginning of the controversy. Rather, the Court finds that the amount to be awarded is an amount that will reasonably

[5] The end of the year is particularly difficult time for professionals engaged in pension plan matters, due largely to year-end deadlines and compounded by the holiday season.

compensate for the costs incurred as a result of the Defendants' unjustified actions. In this case, the Plaintiff 's submission is not a model of adequacy to make this determination. However, it is possible for the Court, utilizing Mr. Sachsel's affidavit and its own observation of the case and knowledge of legal practice, to conclude that the sum of Five Hundred Dollars is reasonable in this regard. Accordingly, the Court will award Plaintiff legal fees and costs in the total amount of Five Hundred Dollars with regard to Count VIII. Because the Court has awarded assessable costs to the Defendants in this case, the instant fee award shall constitute an offset against any award of costs.

CONCLUSION

For the foregoing reasons:

1. Defendants' Motion for Attorneys' Fees and Costs is **GRANTED**.

    a. This Court, by separate Order, is imposing sanctions of Five Thousand Dollars ($5,000.00) on Allen H. Sachsel, Esquire, with regard to his signing of the Second Amended Complaint and Memoranda in Opposition to Defendants' Motion of Summary Judgment with regard to Counts I through VII, inclusive, in violation of Rule 11 of the Federal Rules of Civil Procedure.

2. Plaintiff 's Motion for Attorney's Fees for Count VIII is **GRANTED**.

   a. Plaintiff is entitled to recover the sum of Five Hundred Dollars ($500.00) from Defendant Montgomery Medical Group, P.A. with respect to fees and costs for Count VIII.

   b. Defendant Montgomery Medical Group, P.A. may satisfy this award by an offset of Five Hundred Dollars ($500.00) against the assessable costs awarded in this case against Plaintiff in favor of any Defendant.

SO ORDERED this 29th day of November, 1993.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No.: 92-529-MJG

ORDER IMPOSING SANCTIONS

(Entered November 30, 1993)

For reasons stated in the Memorandum and Order issued this date, pursuant to Rule 11 of the Federal Rules of Civil Procedure, the Court hereby assesses sanctions in the amount of Five Thousand Dollars ($5,000.00) against Allen H. Sachsel, Esquire to be paid to Defendants by February 22, 1994.

SO ORDERED this 29th day of November, 1993.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,
v.
MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

MEMORANDUM AND ORDER

(Entered December 20, 1993)

The Court has before it the Reply to Opposition to Motion for Partial Vacation of order of June 30, 1993, which the Court is treating as a Motion for Reconsideration of the Memorandum and Order issued November 15, 1993. The Court finds that a hearing is unnecessary.

On November 15, 1993, the Court issued a Memorandum and Order denying Plaintiff's Motion for Partial Vacation of Order of June 30, 1993. This Memorandum and Order was inadvertently issued prior to receipt of Plaintiff 's timely filed Reply to Opposition to Motion for Partial Vacation of Order of June 30, 1993. Plaintiff was entitled to have his Reply considered. It now has been.

The Court has reviewed and considered carefully the aforesaid Reply. The document does not, in any way, change the Court's conclusion nor warrant any redrafting of the Memorandum and Order issued November 15, 1993. The Court continues to find most inappropriate the idea that the Plaintiff would wait until receiving this Court's decision and after seeing that it is adverse before seeking to have the matter resolved in another forum.

CONCLUSION

For the foregoing reasons:

1. Plaintiff's Motion for Reconsideration of the Memorandum and Order issued November 15, 1993 is **DENIED**.

2. The Court, after reviewing the Reply to Opposition to Motion for Partial Vacation of Order of June 30, 1993 hereby reconfirms its Memorandum and Order issued November 15, 1993.

SO ORDERED this 14th day of December, 1993.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,
v.
MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

MEMORANDUM AND ORDER

(Entered December 21, 1993)

The Court has before it the Defendant's Motion For Further Sanctions and the materials submitted by the parties relating thereto. The Court finds that a hearing is unnecessary.

For reasons discussed herein the Court again finds it necessary to impose sanctions on counsel for Plaintiff for violation of Rule 11 of the Federal Rules of Civil Procedure.

The instant sanctions do not relate to the lack of merit of Plaintiff 's substantive position regarding Count VI. Nor do they relate to any general procedural inability to file post decisional motions. Rather, the instant sanctions are imposed because of the gross impropriety of Plaintiff 's counsel in filing Plaintiff 's Motion For Partial Vacation Of Order Of June 30, 1993 in the context of this case.

Even if the underlying legal position (i.e. Count VI) had a reasonable basis, the subject motion to vacate should not have been filed. It is most inappropriate for Plaintiff 's counsel to have played the game that was played with the Court and the Defendants regarding the subject motion.

As noted in the Memorandum And Order issued November15, 1993 Plaintiff 's counsel brought the fiduciary duty claim into this Court and presented it to this Court rather than a state court for resolution. He waited to see how he would do in this Court before revealing his idea that the issue would "better" be resolved in state court. Hence, he sought to obtain an expensive "free shot" at the issue in this Court on a "heads I win, tails we play again" basis. Without doubt, had this Court decided that the claim had merit, Plaintiff would have been delighted to proceed in this Court. However, having obtained an adverse decision from this Court, Plaintiff 's counsel seeks a "second opinion" from the state court.

In view of the discussion in the Memorandum And Order issued November 29, 1993 it is not necesary to restate the principles applicable to Rule 11 and the amount of the sanctions to be imposed.

This Court concludess that Plaintiff 's counsel, Allen H. Sachsel, has again violated Rule 11 of the Fedral Rules of Civil Procedure. This time the violative conduct was the signing of Plaintiff 's Motion For Partial Vacation Of Order of June 30, 1993 and the materials relating thereto.

The amount of the sanction shalll be the minimal amount adequate to accomplish the purpose of Rule 11, i.e. to deter further future violations. In this instance, the Court finds that the sum of $500 is the minimum adequate for this purpose.

CONCLUSION

For the foregoing reasons:

1. Defendant's Motion For Further Sanctions is **GRANTED**.

2. This Court, by separate Order, is imposing sanctions of Five Hundred Dollars ($500.00) on Allen H. Sachsel, Esquire, with regard to his signing of Plaintiff 's Motion For Partial Vacation Of Order June 30, 1993 and materials in support in violation of Rule 11 of the Federal Rules of Civil Procedure.

SO ORDERED this 20th day of December, 1993.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

ORDER IMPOSING SANCTIONS

(Entered December 21, 1993)

For reasons stated in the Memorandum and Order issued this date, pursuant to Rule 11 of the Federal Rules of Civil Procedure, the Court hereby assesses sanctions in the amount of Five Hundred Dollars ($500.00) against Allen H. Sachsel, Esquire to be paid to Defendants by February 22, 1994.

SO ORDERED this 20th day of December, 1993.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 17, 1995

No. 93-2631
CA-92-529-MJG

JAMES L. HOOPER, M.D.,
Plaintiff - Appellant

v.

MONTGOMERY MEDICAL GROUP, P.A.; SUSAN J. WITHROW, M.D.; CHARLES KARESH, M.D.; STEVEN DOLINSKY, M.D.; PASQUAL PERRINO, M.D.; CAROLYN BAIER, M.D.; HERBERT JUARBE, M.D.
Defendants - Appellees

and

PAUL R. WEISENFELD; JOHN H. CONRAD
Parties in Interest

No. 94-1022
CA-92-529-MJG

JAMES L. HOOPER, M.D.,
Plaintiff - Appellant

v.

MONTGOMERY MEDICAL GROUP, P.A.; SUSAN J. WITHROW, M.D.; CHARLES KARESH, M.D.; STEVEN DOLINSKY, M.D.; PASQUAL PERRINO, M.D.; CAROLYN BAIER, M.D.; HERBERT JUARBE, M.D.
Defendants - Appellees

v.

PAUL R. WEISENFELD; JOHN H. CONRAD
Parties in Interest

No. 94-1038
CA-92-529-MJG

In Re: ALLEN H. SACHSEL
Appellant

JAMES L. HOOPER, M.D.
Plaintiff

v.

MONTGOMERY MEDICAL GROUP, P.A.; SUSAN J. WITHROW, M.D.; CHARLES KARESH, M.D.; STEVEN DOLINSKY, M.D.; PASQUAL PERRINO, M.D.; CAROLYN BAIER, M.D.; HERBERT JUARBE, M.D.
Defendants - Appellees

v.

PAUL R. WEISENFELD; JOHN H. CONRAD
Parties in Interest

No. 94-1056
CA-92-529-MJG

JAMES L. HOOPER, M.D.
Plaintiff - Appellant

v.

MONTGOMERY MEDICAL GROUP, P.A.; SUSAN J. WITHROW, M.D.; CHARLES KARESH, M.D.; STEVEN DOLINSKY, M.D.; PASQUAL PERRINO, M.D.; CAROLYN BAIER, M.D.; HERBERT JUARBE, M.D.
Defendants - Appellees

v.

PAUL R. WEISENFELD; JOHN H. CONRAD
Parties in Interest

No. 94-1141
CA-92-529-MJG

In Re: ALLEN H. SACHSEL
Appellant

JAMES L. HOOPER, M.D.
Plaintiff

v.

MONTGOMERY MEDICAL GROUP, P.A.; SUSAN J. WITHROW, M.D.; CHARLES KARESH, M.D.; STEVEN DOLINSKY, M.D.; PASQUAL PERRINO, M.D.; CAROLYN BAIER, M.D.; HERBERT JUARBE, M.D.
Defendants - Appellees.

and

PAUL R. WEISENFELD; JOHN H. CONRAD
Parties in Interest

ORDER

Appellants have filed a petition for rehearing.
The Court denies the petition for rehearing.

Entered at the direction of Judge Wilkins, with the concurrence of Judge Chapman. Judge Hall voted to grant rehearing.

For the Court,

/s/ Bert M. Montague
Bert M. Montague
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

SECOND AMENDED COMPLAINT FOR AGE DISCRIMINATION, RETALIATION, BREACH OF CONTRACT FRAUD, BREACH OF FIDUCIARY DUTY, CONSPIRACY, AND ERISA VIOLATION

Plaintiff, by counsel, alleges:

COUNT I

(Age Discrimination in Employment)

1. Jurisdiction of this Court is invoked pursuant to 29 U.S.C. 626 (c) and (d), and 28 U.S.C. 1331 and 1391 (b) and (c).

2. Plaintiff is a resident and citizen of Maryland. He is, and at all times hereto relevant was, over the age of 40.

3. Defendant Montgomery Medical Group, P.A. ("MMG"), is a Maryland Professional Corporation, having its principal office and place of business in Rockville, Maryland, within this judicial district.

4. Defendants Withrow, Karesh, Dolinsky, Perrino, Baier, and Juarbe are individuals who are, and at all times hereto relevant were, stockholders as well as officers and/or directors of defendant MMG and are, and at all times hereto

relevant were, responsible for the management of MMG, including, but not limited to, its employment policies and decisions. They reside in, and have their principal place of business in, Maryland, within this judicial district.

5. Defendants, and each of them, are, and at all times hereto relevant were, employers within the meaning of the Age Discrimination in Employment Act, 29 U.S.C. 621, *et seq.*

6. More than 27 years ago, plaintiff founded what is now MMG.

7. From the founding of what is now MMG, plaintiff was a director of, and President of, the corporation. (Plaintiff was not President of the Corporation for less than one (1) month in 1989. *See*, Counts IV and V, *infra.*)

8. All of the individual defendants were hired by plaintiff.

9. All of the individual defendants in this action are younger than plaintiff. At the time this cause of action arose, all but one of the individual defendants were in their 30's or 40's. The sole exception is defendant Perrino, who is, and was, over 50, but is a number of years younger than plaintiff.

10. In September, 1990, plaintiff suddenly was voted out as President of MMG. Defendant Withrow was elected to replace plaintiff. At that time, plaintiff was 59 years of age.

11. Following voting plaintiff out as President, MMG, through defendant Withrow and other individual defendants began a campaign to harass, discriminate against, humiliate, and embarrass plaintiff for the purpose of causing him to terminate his employment with MMG. Said campaign was begun because of plaintiff 's age.

12. In April, 1991, plaintiff, because of the matters alleged in paragraph 11 hereof, arranged with MMG to purchase his stock in the corporation. The agreed leave of absence was on the specific written agreement that plaintiff would maintain his status as an employee of MMG while such negotiations were ongoing and until an agreement was reached. *See*, exhibit 1 (attached hereto).

13. The agreement referenced in paragraph 12 hereof implies that the parties would negotiate in good faith for such purchase.

14. Despite the agreement referenced in paragraph 12 hereof, defendants failed and refused to negotiate in good faith.

15. Notwithstanding the matters set forth above and the specific written agreement (Exhibit 1) between plaintiff and MMG, MMG and the individual defendants, on August 20, 1991, summarily terminated plaintiff 's employment. At the time of his discharge, plaintiff was 60 years of age, and was the most productive of all physician owners of MMG.

16. In addition to his productivity, as alleged in paragraph 15 hereof, plaintiff had not had malpractice and other professionally related problems certain other of the named individual defendants had had. All such younger physicians were retained despite such problems, whereas plaintiff was discharged. Moreover, defendants have claimed plaintiff was terminated because of his management of MMG. However, under the younger physician who replaced plaintiff as President, MMG lost money, whereas under plaintiff it made a substantial profit. Yet, the younger physician has been retained, whereas plaintiff was discharged.

17. Almost simultaneously with plaintiff 's discharge the named individual defendants voted themselves salary

increases. The total of said increases is substantially identical to the salary plaintiff had been receiving.

18. By reason of the matters set forth above, defendants, and each of them, have violated, and are violating, 29 U.S.C. 623 (a) in that the actions taken against plaintiff, as set forth above, were taken against him because of his age.

19. The discrimination by defendants against plaintiff because of his age was intentional.

20. On or about September 30, 1991, plaintiff filed a Charge of discrimination with the United States Equal Employment Opportunity Commission ("EEOC"). *See*, Exhibit 2 (attached hereto).

COUNT II - 29 U.S.C. 623 (d) (1)
(Retaliation)

21. Plaintiff repeats and realleges each and every allegation of paragraphs 1, 2, 3, 4, 5, and 20 hereof, as if fully set forth.

22. Following receipt of notice of plaintiff 's Charge, defendants, and each of them, began, in violation Of 29 U.S.C. 623 (d) (1), taking actions to retaliate against plaintiff for his having filed with EEOC the Charge referenced in paragraph 20 hereof.

23. On or about December 30, 1991, plaintiff amended his EEOC Charge to allege the acts of retaliation taken against him by defendants. *See*, Exhibit 3 (attached hereto).

24. The Amended Charge alleges the following acts of retaliation by defendants, the substance of which plaintiff realleges here:

a. Defendants failed and refused to comply with, or even respond to, plaintiff 's written request that he be furnished with the names of persons who had selected him individually as their Health Maintenance Organization Plan principal physician. (Such persons are called a physician's Panel.) This is in contravention of the policy of MMG to allow a departing physician to notify members of his or her Panel so that he or she has the opportunity to retain the patients, and to give the patients the option of choice.

b. Defendants notified the Health Maintenance Organizations and Shady Grove Hospital that plaintiff was no longer affiliated with MMG prior to the effective date of his termination.

c. Defendants failed and refused to make payments on a loan taken out by plaintiff for malpractice insurance even though MMG had agreed at the time the loan was taken that it would make the payments. It honored that obligation until plaintiff filed the Charge referenced in paragraph 20 hereof. Such payments total Eight Hundred Eight Dollars ($808.00).

d. Defendants barred plaintiff from the premises of MMG, even for the purpose of picking up his personal mail, and then failed promptly to forward his mail, and in fact opened his personal mail prior to forwarding.

e. MMG keeps the records for a partnership in which plaintiff is involved with several other MMG physicians for the lease of computer

equipment to MMG. No payment or accounting with respect to said partnership has been furnished plaintiff since he filed the Charge referenced in paragraph 20 hereof.

f. Defendants did not pay plaintiff his last 60 days pay.

g. In addition to barring plaintiff from the premises, defendants have sought untrue statements from employees of MMG to the effect that plaintiff was "disruptive." After the particular employees refused to give such a statement on the grounds that they would be saying something untrue, defendants terminated their employment with MMG.

25. By reason of the matters set forth above, and by other acts and conduct, defendants have violated, and are violating 29 U.S.C. 623 (d) (1).

26. The violations by defendants of 29 U.S.C. 623 (d) (1) were and are intentional.

COUNT III
(Breach of Contract - MMG, only)

27. Plaintiff repeats and realleges each and every allegation of paragraph 1, 2, 3, 4, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, and 17 hereof, as if fully set forth.

28. Plaintiff invokes the jurisdiction of this Court with respect to this Court III as pendent to his Federal claims.

29. By reason of the matters set forth above, defendant MMG has breached its contract with plaintiff, as set forth in paragraphs 12-17 hereof.

30. As a direct and proximate result of the breach by defendant MMG of its contract with plaintiff, plaintiff has suffered, and is suffering, loss of payment of his medical malpractice insurance premiums, as well as the loss of other benefits provided to employees of MMG, and to which plaintiff, as an employee, would be entitled.

31. As a direct and proximate result of defendant MMG's breach of its contract with plaintiff, plaintiff has suffered, and is suffering, humiliation and embarrassment, which it was a specific purpose of said contract to avoid and prevent.

32. By reason of the matters set forth above in this Count III, plaintiff is entitled to recover from defendant MMG the sum of One Million One Hundred Thousand Dollars ($1,100,000.00).

33. By reason of the matters set forth above in this Count III, plaintiff is entitled to an Order directing defendant MMG to negotiate in good faith a purchase of his MMG stock.

COUNT IV

(Breach of Contract - Defendants Karesh, Dolinsky, Perrino, Baier, and Juarbe, only)

34. Jurisdiction with respect to this Count is invoked as pendent to plaintiff's Federal claims.

35. In May, 1989, plaintiff orally resigned as President of MMG.

36. On May 8, 1989, plaintiff resigned in writing as a director and employee of MMG, to be effective 90 days hence.

37. In May, 1989, and at all times hereto relevant, to and including part of the day on July 31, 1991, the Board of Directors of MMG consisted of defendants Karesh, Dolinsky, Perrino, Juarbe, Baier, and Withrow, and plaintiff Hooper.

38. Shortly after plaintiff submitted his resignations, defendants Karesh, Dolinsky, Perrino, Baier and Juarbe, asked him to return as President of MMG and not to otherwise resign.

39. The primary reason the above-named defendants asked plaintiff not to resign was because said defendants wished plaintiff to obtain a loan MMG and the said defendants needed to pay a Federal tax liability.

40. Defendants knew and understood that plaintiff would not assist in obtaining the needed loan if he were not President of MMG. They were so informed directly by plaintiff.

41. In order for MMG to obtain the needed loan, it was necessary that plaintiff agree to secure the loan with his personal residence (owned by him and his wife).

42. At the time plaintiff was returned to the Presidency of MMG, plaintiff stated that he and his wife would not pledge their home as collateral for a loan to MMG unless he were President of MMG and had assurances he would remain President of MMG until satisfaction of the loan. The above-named defendants, who, together with plaintiff Hooper, constituted six-sevenths of the Board of Directors of MMG, agreed that plaintiff would remain President of MMG until satisfaction of the loan. (Defendant Withrow did not make such a promise, and, therefore, is not included as a defendant in this Count.)

43. In accordance with the agreement of the above-named defendants, said defendants re-elected plaintiff as President of MMG, and, thereafter, again in the late Summer or early Fall of 1989 re-elected plaintiff as President of MMG.

44. In early 1990, MMG was successful in obtaining the loan referenced above.

45. The loan referenced above could not have been obtained without the pledge of plaintiff's house as collateral.

46. Plaintiff pledged his home as collateral in order to obtain said loan.

47. In September, 1990, at the first election of MMG officers following obtaining the loan referenced above, which loan remained and remains unsatisfied, defendants Karesh, Dolinsky, Perrino, Baier and Juarbe voted against retaining plaintiff as President of MMG, in violation and breach of their agreement referenced above. As a direct and proximate result of said breach by the above-named defendants, plaintiff was not elected as President of MMG in 1990.

48. By reason of the matters set forth above, defendants Karesh, Dolinsky, Perrino, Baier, and Juarbe, and each of them, have breached their agreement with plaintiff.

49. By reason of the matters set forth above in this Count IV, plaintiff is entitled to recover compensatory damages, jointly and severally, from the above-named defendants.

COUNT V

(Fraud - Defendants Karesh, Dolinsky, Perrino, Baier, and Juarbe, only)

50. Plaintiff repeats and realleges each and every allegation of Count IV hereof, as if fully set forth.

51. At the time the above-named defendants made the promises alleged in Count IV hereof, they, and each of them, intended to replace plaintiff as President after he had pledged his home to obtain the loan described in Count IV hereof.

52. Plaintiff relied on the promises of the above-named defendants as an inducement to pledge his home as collateral for the loan described in Count IV hereof, and would not have pledged his home absent such promises.

53. The conduct of the above-named defendants was willful, knowing, malicious, and fraudulent.

54. By reason of the matters set forth in this Count V, plaintiff is entitled to recover from defendants Karesh, Dolinsky, Perrino, Baier, and Juarbe, jointly and severally, compensatory and punitive damages.

COUNT VI

(Breach of Fiduciary Duty -- Defendants Withrow, Karesh, Dolinsky, Perrino, Baier, and Juarbe, only)

55. Plaintiff invokes the jurisdiction of this Court with respect to this Count VI as pendent to his Federal claims.

56. Plaintiff repeats and realleges each and every allegation of paragraphs 2, 3, 4, 6, 7, 8, 10, 11, 16, and 17 hereof as if fully set forth.

57. The purpose of defendants' campaign of harassment was not only to force plaintiff to abandon his employment, but, in addition, was to deprive plaintiff of the value of his ownership of MMG stock and of his anticipated intent, as an owner and "partner" of MMG, to practice his profession in a dignified manner as an owner of a medical practice, and, in addition, was to appropriate to the use of the above-named defendants plaintiff's panels of patients.

58. Defendants, and each of them, took and/or authorized actions designed to humiliate and embarrass plaintiff and cause him to leave and abandon his practice. Such actions included denying plaintiff office keys, ordering him to vacate his office, writing sarcastic memos, encouraging and soliciting MMG employees to complain about plaintiff, and seeking to force plaintiff to work in a satellite office, and otherwise seeking to humiliate and embarrass plaintiff. In addition, the above-named defendants excluded plaintiff from meetings and met secretly away from MMG to make corporate policy and plan actions against plaintiff. Such meetings included consultations with counsel to MMG from which plaintiff, a member of the Board of Directors, was excluded, and which were kept secret from him.

59. At all times hereto relevant, the above-named defendants and plaintiff were the only stockholders and directors of MMG.

60. At all times hereto relevant, the above-named defendants and plaintiff referred to themselves as "partners" in a close corporation.

61. By reason of the matters set forth above, and by other acts and conduct, defendants, and each of them, breached fiduciary duties owed as shareholder/"partners" in a close corporation to plaintiff, and failed, as required by law, to deal in good faith with plaintiff.

62. The conduct of the above-named defendants was willful, knowing, deliberate, and malicious, and was intended to create, and did create, an oppressive atmosphere for plaintiff, and in addition to other damages caused plaintiff the loss of his patient panels.

63. By reason of the matters set forth in this Count VI, plaintiff is entitled to recover from the above-named defendants, jointly and severally, compensatory damages (including, but not limited to, the value of plaintiff 's patient panels), and punitive damages.

COUNT VII

(Conspiracy - Defendants Withrow, Karesh, Dolinsky, Perrino, Baier, and Juarbe, only)

64. Plaintiff repeats and realleges each and every allegation of Count VI hereof, as if fully set forth.

65. The actions of defendants, and each of them, was an agreed course of conduct carried out in concert to accomplish through lawful and unlawful means the unlawful objectives described in Count VI hereof.

66. The acts of the above-named defendants, as set forth above, constituted an unlawful and actionable civil conspiracy.

67. By reason of the matters set forth above in this Count VII, plaintiff is entitled to recover from the above-named defendants, jointly and severally, compensatory damages (including, but not limited to, the value of plaintiff 's patient panels), and punitive damages.

COUNT VIII

(Monetary and Declaratory Relief for Failure to Provide Pension Plan Benefits and for Breach of Fiduciary (ERISA) - MMG, only)

68. Jurisdiction of this Court is invoked pursuant to Section 502, 29 U.S.C. 1132, of the Employee Retirement Income Security Act ("ERISA"), and 28 U.S.C. 1331, 1391(b), and 2201 (a).

69. Effective August 1, 1970, a Money Purchase Pension Plan (the "Pension Plan") was established for the purpose of providing retirement benefits for the employees of MMG (then known as Deer Park Medical Group, P.A.). Plaintiff became a participant in the Pension Plan as of its effective date.

70. Pursuant to Section 6.01 of the Pension Plan, MMG was designated as its "Named Fiduciary" within the meaning of ERISA Sec. 402, 29 U.S.C. 1102, and was in charge of its operation and administration. MMG also had authority to amend and terminate the Pension Plan pursuant to Section 7.01.

71. In accordance with the Pension Plan's provisions, MMG made annual contributions on behalf of each participant, such contributions being based on stated percentages of participant compensation. The contributions made on behalf of each participant were credited to an account maintained for such participant. The Pension Plan also provided for the proportionate allocation to each participant's account of interest and investment gains and losses derived from Pension Plan assets. Assets of the Pension Plan were commingled for investment purposes with the assets of a Profit Sharing Plan which was also maintained by MMG for its employees.

72. The Pension Plan was terminated by MMG, effective June 10, 1989, and accordingly no contributions were made by MMG for the plan year ending July 31, 1989, or any subsequent plan year. Because of the need to resolve various accounting matters, distribution of participants' account balances pursuant to the termination did not begin until late December, 1990.

73. As of the plan year ending July 31, 1990, the Pension Plan had net assets of $945,070. Plaintiff 's account balance as of such date was valued at $326,521, or approximately 34.5% of the Pension Plan's net assets.

74. On or about December 21, 1990, plaintiff received a distribution of his Pension Plan account balance as of July 31, 1990, as did almost all other Pension Plan participants. At the time of this distribution, plaintiff was advised by MMG's actuarial consultant that a calculation would thereafter be made of each participant's share of the interest and investment gains earned on the $945,070 in Pension Plan assets since July 31, 1990. However, plaintiff has never been paid any share of such interest or investment gains, and believes that no other plan participant has been paid the promised interest or investment gains.

75. Annual reports (Forms 5500-C/R) filed by MMG with the Internal Revenue Service for the plan year ending July 31, 1991 show that a total of $45,005 was earned during the plan year by the combined assets of the Pension Plan and the Profit Sharing Plan. However, the reports indicate that of this amount, only $1,067 in earnings was apportioned to the Pension Plan, notwithstanding that the Pension Plan had $945,070 in net assets from July 31, 1990 until late December, 1990. The Profit Sharing Plan, with net assets of only $210,541 as of July 31, 1990 and $168,253 as of July 31, 1991, was apportioned $43,938 of the combined earnings for the plan year.

76. In a letter dated September 10, 1992, an attorney representing plaintiff objected on his behalf to the grossly disparate apportionment of earnings in favor of the Profit Sharing Plan for the plan year ending July 31, 1991, and requested that MMG pay plaintiff his proportionate share of properly calculated Pension Plan earnings for that plan year.

77. In response to the September 10, 1992 letter, MMG provided an explanation, prepared by its actuarial consultant, to the effect that under the provisions of both the Pension Plan and Profit Sharing Plan, interest and other investment earnings are to be allocated only as of the end of each plan year, based on plan-year-end account balances, and that no earnings for a plan year are allocated to any participant whose account balance was distributed during the plan year. Since almost all Pension Plan accounts had been distributed during the plan year pursuant to the termination of that Plan (only $4,087 remained undistributed as of plan year end), the procedure adopted by MMG resulted in almost all of the Pension Plan's share of earnings during that plan year being allocated to those Profit Sharing Plan participants who had account balances in the latter plan as of July 31, 1991. As plaintiff did not have an account balance in either Plan as of July 31, 1991, neither he nor other similarly situated Pension Plan participants received any share of Pension Plan earnings for the plan year ending July 31, 1991.

78. MMG's treatment of Pension Plan earnings during the plan year ending July 31, 1991 is not justified by the provisions of the Pension Plan or the Profit Sharing Plan. Sections 4.04 and 4.05 of the Pension Plan and IV(2) and (3) of the Profit sharing Plan do provide for the valuation of assets as of the end of each plan year, and the allocation of interest and other investment gains and losses to individual participants in proportion to their plan-year-end account balances. However, Sections IV(2) and (3) of the Profit Sharing Plan also provide that such valuations and allocations

may be made as of other dates as well. It was the evident intent of the Pension Plan to provide similarly. Section 4.05(c) of the Pension Plan states in pertinent part (emphases added):

> As of the last day of each Plan Year *or other valuation date*, as is provided above in Sec. 4.04 of this Article IV, before allocation of Forfeitures and Employer Contributions, any interest, dividends, other income, and the total realized and unrealized capital gains and losses (net appreciation or net depreciation) which have arisen since the last valuation date of the Trust Fund shall be allocated in the same proportion that each Participant's and former Participant's nonsegregated Accounts bear to the total of all Participants' and former Participants' nonsegregated Accounts *as of such date*.

79. The practice of valuing plan assets only as of the end of each plan year, and allocating earnings in proportion to participant account balances as of such date, is generally appropriate for an ongoing plan. However, once MMG had terminated the Pension Plan, which action resulted in the distribution of almost all account balances during the middle of, rather than at the end of, a plan year, MMG should have exercised its authority to establish an alternative valuation and allocation date which would have provided Pension Plan participants with an equitable share of interest and investment gains earned by the Pension Plan's assets subsequent to July 31, 1990. By failing to do so, MMG deprived Pension Plan participants, including plaintiff, of earnings attributable to the assets of their Plan, and provided a windfall to those Profit Sharing Plan participants who had account balances as of July 31, 1991, including defendants (in other Counts of this action) Withrow, Karesh, Dolinsky, Perrino, Baier, and Juarbe.

80. Pursuant to ERISA Sec. 403(c)(1), 29 U.S.C. 1103(c)(1), the assets of the Pension Plan were required to be held for the exclusive purpose of providing benefits to participants in the Plan. Moreover, as the "named fiduciary" of the Pension Plan, MMG was obliged by ERISA Sec. 404(a)(1)(A), 29 U.S.C. 1104 (a)(1)(A), to discharge its duties with respect to the Pension Plan solely in the interest of its participants and for the exclusive purpose of providing benefits to those participants.

81. By allocating earnings on Pension Plan assets to Profit Sharing Plan participants, as described in paragraph 77 hereof, rather than to Pension Plan participants, MMG violated the express mandates of ERISA Sec. 403(c)(1), and breached its fiduciary duty under ERISA Sec. 404(a)(1)(A), all to plaintiff's damage. This breach of fiduciary duty inured primarily to the benefit of defendants Withrow, Karesh, Dolinsky, Perrino, Baier, and Juarbe, and to the detriment of plaintiff Hooper and other participants in the Pension Plan who received distributions and no longer had account balances in the Profit Sharing Plan.

82. Pursuant to ERISA Sec. 502(g), 29 U.S.C. 1132(g), plaintiff is entitled to recover reasonable attorney's fees and costs incurred in the bringing of this action.

WHEREFORE plaintiff respectfully prays with respect to Count I that he be awarded damages in such amount as will compensate him for his lost income and employment and benefits from the date of his discharge to age 70. With respect to Count II, plaintiff respectfully prays that he be awarded damages of Five Million dollars ($5,000,000.00) to compensate him for loss of his HMO Panels, compensation of Eight Hundred Eight Dollars ($808.00) for payment on his malpractice insurance loan, as alleged in paragraph 24 c hereof, 60 days pay of $13,500.00, an Order directing defendants not to ban plaintiff from MMG's premises, an

Order directing defendants not to open plaintiff 's mail and to forward such mail promptly, and an Order directing defendants to account for and pay over monies due from the partnership referenced in paragraph 24e hereof. Plaintiff further prays with respect to Counts I and II that he be awarded liquidated damages as provided in 29 U.S.C. 626 and 216, attorney's fees, punitive damages of One Million Dollars ($1,000,000.00) for Counts I and II, each, and all costs and disbursements of this action.

With respect to Count III, plaintiff respectfully prays that he be awarded damages of One Hundred Thousand Dollars ($100,000.00) to compensate him for his lost benefits, as set forth in paragraph 30 hereof and damages of One Million Dollars ($1,000,000.00) for humiliation and embarrassment. Plaintiff further prays for an Order directing defendants to negotiate in good faith a purchase of his MMG stock.

With respect to Count IV, plaintiff respectfully prays that he be awarded compensatory damages in such amount as will compensate him for having pledged his home against defendants Karesh, Dolinsky, Perrino, Baier, and Juarbe, jointly and severally.

With respect to Count V, plaintiff respectfully prays that he be awarded compensatory damages, as prayed in Count IV hereof, jointly and severally, against defendants Karesh, Dolinsky, Perrino, Baier, and Juarbe, and punitive damages, jointly and severally, against said defendants in the sum of Ten Million Dollars ($10,000,000.00).

With respect to Counts VI and VII, plaintiff respectfully prays that he be awarded compensatory damages against defendants Withrow, Karesh, Dolinsky, Perrino, Baier, and Juarbe, jointly and severally, in the sum of Five Million Dollars ($5,000,000.00), and punitive damages against said

defendants, jointly and severally, in the sum of Ten Million Dollars ($10,000,000.00).

With respect to Count VIII, plaintiff respectfully prays that this Court declare that defendant MMG violated its duties and obligations under ERISA and the Pension Plan by failing to provide participants with their proper share of Pension Plan interest earnings during the Plan Year ending July 31, 1991, and that he be awarded damages in an amount to be determined, representing his proportionate share of interest and other investment earnings on Pension Plan assets during the period from July 31, 1990 until December 21, 1990, and for interest on such unpaid amount to the date of judgment. Additionally, plaintiff respectfully prays that he be awarded attorney's fees pursuant to 29 U.S.C. 1132 (g).

With respect to all Counts, plaintiff respectfully prays he be awarded all costs and disbursements of this action, and such other and further relief as this Court deems just, equitable, and proper.

Plaintiff demands trial by jury on all Counts of this Complaint.

Respectfully submitted,

/s/ Allen H. Sachsel
ALLEN H. SACHSEL
Counsel for Plaintiff
3817 Plaza Drive
Fairfax, Virginia 22030
(703) 385-9400
Bar No. 09272

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,

Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A., *et al.*,

Defendants.

Civil Action No.:92-529-MJG

PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ALLEN H. SACHSEL
Counsel for Plaintiff
10603 Judicial Drive
Fairfax, Virginia 22030
(703) 385-9400
Bar No. 09272

CONTENTS

Page

I. FACTS 1

II. ARGUMENT 9

A. The Summary Judgment Standard 9

B. Age Discrimination 20

C. Retaliation 14

D. Breach of Contract -- The Leave of Absence Agreement 15

E. The 1989 Oral Contract 19

F. Fraud 20

G. Breach of Fiduciary Duty 22

H. Conspiracy 25

I. ERISA 26

III. CONCLUSION 28

CERTIFICATE OF SERVICE 29

TABLE OF AUTHORITIES

Page

Cases:

Ballinger v. North Carolina Agr. Extension Service, 815 F.2d 1001 (4th Cir. 1987), *certiorari denied* 484 U.S. 897 (1987) 9

Bonnes v. Long, 599 F.2d 214 (4th Cir. 1979) 27,28

Bonnes v. Long, 651 F.2d 214 (4th Cir. 1981) 27

Cain v. Cain, 334 N.E.2d 650 (Mass. App. 1975) 23

Charbonnages De France v. Smith, 579 F.2d 406 (4th Cir. 1979) 9,16

Columbia R.E. Title Ins. Co. v. Caruso, 39 Md. App. 282, 384 A.2d 468 (1978) 25

Daughterty v. Kessler, 264 Md. 281, 286 A.2d 95 (1971) 26

De Long Equip. v. Washington Mills Abrasive Co., 887 F.2d 1499 (11th Cir. 1989) 26

Donahue v. Rodd Electrotype Co. of New England, Inc., 328 N.E.2d 505 (Mass. 1975) 23

Dresden v. Willcock, 518 F.2d 281 (3rd Cir. 1985) 24

E.E.O.C. v. Peterson Howell & Heather, Inc., 702 F. Supp. 1213 (D.Md. 1989) 12

Evans v. Blesi, 345 N.W.2d 775 (Minn. App. 1984) 24

Page

Fairchild Stratos Corp. v. Siegler Corp., 225 F. Supp. 135 (D.Md. 1963) 19

Featherson v. Montgomery County Public Schools, 739 F. Supp. 1021 (D.Md. 1990) 10

Green v. Wash. Sub. San. Comm'n, 259 Md. 206, 269 A.2d 815 (1970) 25

Goodman v. Poland, 395 F. Supp. 660 (D.Md. 1975) 24

Hartung v. Architects Hartung/Olde/Burke, Inc., 301 N.E.2d 240 (Ind. App. 1973) 23

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Lewis v. AT&T Technologies, Inc., 691 F. Supp. 915 10,15

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Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 27

Page

Orchard v. Covelli, 590 F. Supp. 1548
(W.D.Pa. 1984) 24

Parker v. Federal Nat. Mtg. Ass'n, 741 F.2d 975
(7th Cir. 1984) 12

Pettway v. American Cast Iron Pipe Co.,
411 F.2d 998(5th Cir. 1969) 15

Polsby v. Chase, 970 F.2d 1360 (4th Cir. 1992),
petition for a writ of certiorari pending
(No. 92-966) 14

Price Waterhouse v. Hopkins, 490 U.S. 288 (1989) 13

Reinking v. Philadelphia Am. Life Ins. Co.,
910 F.2d 1210(4th Cir. 1990) 27

Rodriguez v. MEBA Pension Trust, 956 F.2d 468
(4th Cir. 1992) 27,28

Shimp v. Shimp, 287 Md. 372, 412 A.2d 1228 (1980) 18

Thompkins v. Morris Brown College, 752 F.2d 558
(11th Cir. 1985) 13

In re: W.S.M. Enter., Inc., 102 B.R. 461
(Bankr. D.Md. 1989) 16

Tufts v. Poore, 219 Md. 1, 147 A.2d 717 (1959) 21

Wilson v. S&L Acquisition Co., L.P., 940 F.2d 1429
(11th Cir. 1991) 21

Page

Statute:

29 U.S.C. 623(a) 10

Miscellaneous:

Black's Law Dictionary (6th ed. 1990) 23

5A M.L.E. "Contracts" 17,18

Restatement (Second) Contracts 17

Ruzicho, Jacobs, and Thrasher, *Employment DiscriminationLitigation* (Anderson Pub. Co. 1989) 15

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,
v.
MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No.:92-529-MJG

OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. FACTS

In 1964, James L. Hooper, M.D., plaintiff in this case, founded a medical practice in Gaithersburg, Maryland (Hooper Aff., A. 1).[1] The practice was known as Hooper and Kordon, P.A., later became Deer Park Medical Group, P.A., and finally, in 1986, Montgomery Medical Group, P.A. ("MMG").[2] Except for a brief period in May, 1989 (*see, infra*), Dr Hooper was President of the corporation from its inception until September, 1990 (Hooper Aff., A. 2-3).

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[1] "A." references, except as otherwise indicated, are to the Appendix submitted with this opposition. Other references are to attachments and exhibits submitted by defendants. We have attempted to avoid reproducing materials already furnished by defendants. The original of Dr. Hooper's affidavit is attached to the original of this opposition. The affidavit is not attached to the copies of the opposition since it is reproduced in the Appendix.

[2] As stated, *infra*, MMG has sold substantially all of its assets in such a way as to attempt to defraud Dr. Hooper of his equity. In April, 1993, the name of MMG was changed to Perrino, Dolinsky, Karesh, Withrow, Juarbe & Baier, M.D., P.A. (Hooper Aff., A.1).

Over the years the practice grew. While the form of the practice was a professional corporation, in fact, it was operated much like a partnership. Thus, the number shares purchased by persons hired by Dr. Hooper directly related to their scheduled hours of work -- those working full-time owning 50 shares each, and those working 3/4 time owning 37p shares each[3]. A physician who accepted an offer to become a "partner" automatically was elected to the board of directors and, regardless of the number of shares owned, had an equal voice in the management of the practice -- one vote per partner. Payments to the principals, who considered themselves "partners", were based solely on their hours worked. Hooper Aff., A.2-3

As stated, *supra*, all of the Individual Defendants in this case were hired by Dr. Hooper. At the time this case arose, there were, in addition to Dr. Hooper, six shareholder/ "partner"/directors of MMG, all younger than Dr. Hooper. Hooper Aff., A.3.; Withrow Dep., A.103, 128-129. In 1989, it was discovered that MMG had failed to deposit employee withholding taxes for an approximate two-year period and owed in excess of $1,000,000 in principal, interest, and penalties. The liability was unknown to any of the partners, all of whom had check signing authority, until the IRS telephoned. All of the partners had liability, jointly and severally, for the IRS obligation to the full extent an individual may be held liable for such a corporate obligation. All had benefited from the fact the funds not paid were available to the practice. Hooper Aff., A.2-3.

As a result of the obligation, MMG and Dr. Hooper, through counsel, began negotiating with the IRS for time to pay, and began seeking bank loans to satisfy the IRS debt. Dr. Hooper, who, as stated above, was President of MMG, was

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[3] All of the Individual Defendants were hired by Hooper (Hooper Aff., A.1).

critical to obtaining a loan, which appeared to be necessary if MMG were to survive. This was so because of his own assets, and because of his relationship with a particular bank president. Hooper Aff., A.3; Dolinsky Dep., A.23-26.

In May, 1989, Dr. Hooper resigned as President of MMG because of his unhappiness with the other partners' treatment of an employee. At that time he stated he would not guarantee any bank loan and struck out his signature on papers relating thereto. Hooper Aff., A.2-4; Dolinsky Dep., 23-26.

After MMG had been turned down by other banks, and after Dr. Hooper resigned as President and stated he would not guarantee a loan for MMG, five of the six other partners, all of whom are defendants in this action, requested Dr. Hooper to return as President. The admitted primary reason for wanting Dr. Hooper back as President was his ability to obtain the loan. Hooper Aff., A.2-4; Dolinsky Dep., A.23-26; Perrino Dep., A.133-139; Withrow Dep., A. 114.

Dr. Hooper agreed to return as President in May, 1989, on the specific agreement, entered into by five of the six individual defendants, that he would remain President of MMG until the loan for the IRS obligation ("IRS loan") would be satisfied.[4] This was important to Dr. Hooper because his home, the largest single item of non-corporate collateral, was to be pledged to secure the loan. Hooper Aff., A.3. Prior to the time the loan was obtained, Dr. Hooper was re-elected as President at the annual meeting held in the late Summer or early Fall of 1989. (Perrino Dep., A.139).

In early 1990, the IRS loan was finalized. Dr. Hooper's home was pledged. Hooper Aff., A.2-4.

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[4] Defendant Withrow did not enter into the agreement with Dr. Hooper (Hooper Aff., A.3.).

The first election of MMG officers after securing the loan occurred in September, 1990. At that very next election after Dr. Hooper had obtained and guaranteed the loan, he was voted out as President. Susan Withrow was elected.[5] Hooper Aff., A.4.

Just after the September, 1990 election, Steven Dolinsky, the Individual Defendant who had nominated Withrow (Hooper Aff., A.4), received a phone call in the office. According to Tina Rankin, Dolinsky's secretary, Dolinsky stated to the caller:

> [W]e voted Dr. Hooper's old ass out as President and now we have younger blood . . . running the corporation. It is just a matter of time until we get his old ass out completely.

(Rankin Dep., A.181). Dolinsky then told Ms. Rankin to "just act like you did not hear the phone conversation" (Rankin Dep., A.182).

Almost immediately after Withrow was elected President, MMG and the Individual Defendants began a campaign of harassment against Dr. Hooper. Specifically, it was demanded that Dr. Hooper vacate the office he had occupied for years. Then, he was ordered not to work in the main office, but instead was to work at a satellite office 20 miles away. *See*, Perrino Dep., A. 163. He was subjected to verbal abuse and was generally treated in a demeaning fashion, and he was denied keys to the office. (Hooper Aff., A.4; Exh. 1 (attached hereto)). He also was excluded from what were, in effect, directors' meetings held secretly among the other six shareholder/partner/directors. *See*, Rankin Dep., A. 186-187, 190, 195; Miles Dep., A. 128. The other partners treated Dr.

[5] Dr. Hooper initially did not vote for Withrow. When the matter of her election was a *fait accompli*, Dr. Hooper stated he would go along with it. Hooper Aff., A.4.

Hooper as less than a full partner. Hooper Aff., A.4-7. *See also*, Miles Dep., A. 37-38.

Understandably, Dr. Hooper did not take kindly to this treatment. He responded both calmly and emotionally to such behavior by people whom he had hired into the practice he founded, and whom he had made his partners. Hooper Aff., A.6-7.

Finally, in early 1991, Dr. Hooper concluded that the others, all of whom he had brought into the practice, wished him to leave.[6] He was prepared do so if the corporation bought his stock at a fair price. Hooper Aff., A.5-7.

In early April, 1991, Dr. Hooper reached an oral agreement with Susan Withrow, who, as part of her duties as President (*see*, Perrino Dep., A. 161), was authorized to deal with "Dr. Hooper problems" (A.229), that he would take a leave of absence while an agreement was worked out concerning the purchase of his MMG stock. On April 18, 1991, this agreement was reduced to writing and *signed* by

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[6] As stated above, MMG and the Individual Defendants, after Withrow was elected President, began a campaign of harassment against Dr. Hooper. Criticism was leveled at him at every turn and any perceived problems were handled in condescending and sarcastic ways. MMG and the Individual Defendants stated they believed he was damaging to the corporation. By contrast, as alleged in the complaint, other partner physicians were not treated in this manner. In fact, one of the other partners who had taken sexual liberties in the office with a female patient, gone to her apartment, overdosed her with drugs, and sodomized her had no action taken against him. Dr. Hooper had wished to terminate him, but the others refused to, one of them stating to excuse the behavior that the offending partner was "a young and unmarried fellow." *See*, Hooper Aff., A.5-6. We have been denied discovery with regard to this and malpractice and dereliction of duty claims against another partner physician. Objections to those rulings are pending before the Court. We believe that evidence is relevant to the question of disparate treatment.

both Dr. Hooper and Withrow.[7] Withrow testified that she took the memorandum to the Board. She testified (Withrow Dep, A.111):

> All of the partners were aware and given copies of this note [the April 18 agreement]. Dr. Hooper took a unilateral action and chose to take a leave of absence which all of us chose to accept.

Thereafter, memoranda were circulated at MMG confirming that Dr. Hooper was on a leave of absence (A.228).

Negotiations stalled with regard to purchase of Dr. Hooper's stock. There was a complete lack of good faith by MMG in that, as part of the buy-out, MMG demanded that Dr. Hooper give MMG and the Individual Defendants a general release, and that MMG and its partners give Dr. Hooper no release of claims. No price ever was offered by MMG for the stock.[8] Hooper Aff., A.7.

With the negotiations placed in this posture by MMG's bad faith failure to honor its agreement to negotiate, MMG determined unilaterally, without any discussion with Dr. Hooper, to terminate Dr. Hooper's employment. A meeting was called for that purpose for July 31, 1991. Notwithstanding that Dr. Hooper requested a rescheduling of the meeting to a time when he could attend, the MMG board

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[7] Defendants state (Mem. at 18, 19) that the agreement was initialed by Withrow. The document shows on its face Dr. Withrow's signature. Moreover, Withrow testified (Withrow Dep., A.104-105) that her signature appears on the document.

[8] Counsel for MMG was directed to draft a buy/sell agreement applicable to *all* partners. Magistrate Judge Kenkel has precluded us from making inquiry to these consultations. Objections are pending before the Court.

met on July 31, 1991, did not re-elect Dr. Hooper a director, and voted to terminate his status as an employee. Hooper Aff., A.7. Dr. Hooper was notified by letter dated August 20, 1991, that his employment would terminate 60 days thereafter-- October 19, 1991. Hooper Aff., A.7; Exh. 2 (attached hereto).

In September, 1991, Dr. Hooper filed his charge of age discrimination. Thereafter, and prior to his official termination date, he requested lists of his panels of patients so that he could, if he wished, enter private practice and notify such patients of his availability. Defendants did not respond to Dr. Hooper's request. Hooper Aff., A.8. Similarly, defendants failed to pay loan payments it had promised to pay on malpractice insurance premiums (Hooper Aff., A.8; Dolan Dep. A.178-179; Dolinsky Dep., A.54-56), failed to pay Dr. Hooper's last 60 days pay (Hooper Aff., A.8), banned him totally from the premises at a time he still was an employee (Hooper Aff., A.8), notified the HMO's and hospitals that Dr. Hooper was no longer affiliated with MMG while he still was employed (Hooper Aff., A.8), and refused to account to Dr. Hooper for a computer billing partnership. Dr. Hooper amended his Charge to allege retaliation for having filed the Charge.

This action was instituted in January, 1992. The initial complaint alleged Age Discrimination and breach of the April, 1991 leave of absence agreement. Prior to answer, the Complaint was amended to allege the above-mentioned acts of retaliation. Thereafter, the complaint was again amended to allege the breach of contract with regard to the five of the Individual Defendants' promises to retain Dr. Hooper as President until the IRS loan is paid, fraud in procuring Dr. Hooper's signature on the loan and obtaining the pledge of his home, breaches of fiduciary duties owed to Dr. Hooper in a closely held corporation, conspiracy to breach such duties, and ERISA violations (*see*, A.221-227) by MMG.

On April 1, 1993, subsequent to service of the instant motion, MMG held a special stockholders' meeting to vote on a sale of substantially all of its assets. The notice of the meeting was sent on March 16, 1993, and failed to provide any details of the proposed sale. MMG refused to provide any information prior to the meeting. Dr. Hooper, noting his objections, attended the meeting, and left prior to the vote at which the six Individual Defendants voted to sell the assets at an unrealistically low price of 1.5 Million Dollars. The six, all of whom are directors, sold the assets, obtained for themselves from the purchasers employment contracts for 1/3 more than their current salaries, and further appropriated to themselves the equity in the corporation by including in the employment contracts a provision giving them approximately $285,000 each, ostensibly as bonuses for a narrow non-complete agreement.[9] Said action has substantially increased Dr. Hooper's damages from defendants' wrongful acts.

II. ARGUMENT

A. The Summary Judgment Standard

The standards applicable to ruling on a summary judgment motion need not be set forth at great length. Basically, the question is whether there are material facts in dispute. If there are, and a reasonable trier of fact *could*, viewing the evidence in the light most favorable to the non-moving party, find against the movant, summary judgment should be denied. The standard is essentially that governing ruling on a motion for a directed verdict.

With respect to cases involving questions of motivation, intent, and states of mind, while summary

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[9] As stated, *supra*, n. 2, the name of the corporation also was changed.

judgment is not in all cases precluded, it is "seldom appropriate." *Charbonnages De France* v. *Smith*, 597 F.2d 406, 414 (4th Cir. 1979). As the Fourth Circuit explained in *Charbonnages* at 414:

> [S]ummary judgment is seldom appropriate in cases wherein particular states of mind are decisive elements of a claim or defense. [Citations omitted.] This reflects a general perception that whether as a matter of fact any particular state of mind exists can seldom be considered beyond reasonable dispute because this depends entirely upon the conflicting inferences to be drawn from evidence so likely to be circumstantial or, if direct, self serving.

To like effect, see, *Ballinger* v. *North Carolina Agr. Extension Service*, 815 F.2d 1001, 1005 (4th Cir. 1987), *certiorari denied*, 484 U.S. 897 (1987); *Featherson* v. *Montgomery County Public Schools*, 739 F.Supp. 1021, 1025 (D. Md. 1990).

B. Age Discrimination

Under the teaching of *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973), a *prima facie* case of discrimination in violation of 29 U.S.C. 623 (a) is established by showing the plaintiff is a member of the protected class, that an adverse action was taken against him, under circumstances in which "age was a determining factor." *Lovelace* v. *Sherwin-Williams Co.*, 681 F.2d 230, 238-239 (4th Cir. 1982).[10]

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[10] *McDonnell Douglas* actually considers the criteria applicable to rejection for a position and sets forth a formula for that precise discriminatory conduct. Thus, "[i]t is possible to establish a *prima facie* case without satisfying all the *McDonnell Douglas* criteria, because, "*McDonnell Douglas* standards [are] not inflexible because the facts

There is no question that the facts establish a *prima facie* case. Dr. Hooper was the oldest physician in the practice, he was competent to perform his duties, he was discharged, all of the other persons retained were younger, criticism of Dr. Hooper was constant, whereas serious derelictions of others were overlooked, and there is a direct statement of defendant Dolinsky clearly evidencing discriminatory motive. Moreover, it was suggested to Dr. Hooper he was " getting close to retirement age" and defendant Dolinsky testified he thought Dr. Hooper possibly might be kept in an "emeritus" status. Defendants thus are required to articulate non-discriminatory reasons for their conduct. Plaintiff then must show the reasons are pretextual and/or other evidence of discriminatory motive.

Defendants' reasons are pretextual and lack credibility. The articulated reasons for Dr. Hooper's termination are (Mem. at 12-13):

> . . . the basis for the decision to terminate Dr. Hooper was a consideration of what was in the best interests of the corporation. [Record references omitted.] More particularly, the Individual Defendants believed that Dr. Hooper's conduct was detrimental to MMG; that he was abusive to employees, disrespectful of his colleagues, disdainful of policies and procedures, and generally behaved in a manner which was both hostile and destructive. [Record references omitted.] In addition, several of the Individual Defendants believed Dr. Hooper was self-dealing and negotiating certain financial arrangements for himself with

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necessarily vary in [discrimination] cases." *Lewis* v. *AT&T Technologies, Inc.*, 691 F.Supp. 915, 919 (D. Md. 1988).

> others which were contrary to his obligations to MMG as his employer. [Record references omitted.] Finally, the Board of Directors based their decision to terminate him in part on his unilateral and unauthorized "leave of absence," which was, in their opinion, directly contrary to his obligations to MMG and to the Individual Defendants.

These alleged conclusory reasons do not withstand scrutiny, are patently pretextual, and were created by the defendants' conduct toward Dr. Hooper. Moreover, the state of mind and future intent of the defendants at the time they voted Dr. Hooper out as President is made clear by Dolinsky's statement, which defendants have not denied (Rankin Dep., A. 181):

> Yes, we voted Dr. Hooper's old ass out as President and now we have younger blood . . . running the corporation . . . It is just a matter of time until we get his old ass out completely.

This statement standing alone is enough to establish discriminatory motive.[11] When combined with Dolinsky's suggestion to Dr. Hooper that Dr. Hooper might want to

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[11] A plaintiff in an age discrimination case "can survive a motion for summary judgment simply by producing circumstantial evidence from which a trier of fact can reasonably infer that age was determining factor in the employment decision." *Parker* v. *Federal Nat. Mtg. Ass'n*, 741 F.2d 975, 980 (7th Cir. 1984); *E.E.O.C.* v. *Peterson Howell & Heather, Inc.* 702 F.Supp. 1213, 1228 (D. Md. 1989) (evidence of employer's reputation for discrimination sufficient). Here, there is not merely generic evidence. There is direct evidence of MMG's discriminatory motive in this particular employment decision and action. Defendants, who "voted Dr. Hooper's old ass out as President" and had "younger blood running the corporation", fully intended to conclude their discrimination, and did so, by "get[ting] his [Dr. Hooper's] old ass out completely."

consider leaving because he was "getting close to retirement age" (Mem. at 10-11), and Dolinsky's statement that he considered Dr. Hooper might be offered an "emeritus position" (Dolinsky Dep., A. 29), it unquestionably supports a conclusion that age was a factor in employment decisions affecting Dr. Hooper. Especially is that so when the statements are combined with the conclusory and transparently pretextual reasons given for the adverse actions. *See*, Dolinsky Dep., A. 13-23; Withrow Dep., A. 115-124; Rankin Dep., A. 188. Dr. Hooper's evidence, and particularly Dolinsky's admission of discriminatory motive, shifts the burden to the defendants to "rebut *only* by proving by a preponderance of the evidence that the same decision would have been reached even absent evidence of [the proscribed] factor". *Thompkins* v. *Morris Brown College*, 752 F.2d 558, 563 (11th Cir. 1985) (emphasis added) ("President of defendant college [allegedly] said that he saw no reason for a woman to have a second job", and "Vice President of Academic Affairs of defendant college [allegedly] stated that the reason plaintiff could not have four classes in the afternoon like men was because those males had families and needs the plaintiff did not have" (752 F.2d at 561).) *Thompkins* states substantially the same standard as articulated by the Supreme Court four years later in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 258 (1989).[12] Thus, when there are mixed motives for an adverse action, one of which is legally proscribed, the actor has the burden of establishing he would have taken the same action without the presence of the proscribed motive. The burden in such a case shifts to the defendant, and it is not placed on the plaintiff to show the proscribed motive was dominant. *Price Waterhouse*, *supra*, 490 U.S. at 240-242, 250.

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[12] The Supreme Court states that the employer's burden is that of an affirmative defense. 490 U.S. at 246.

In short, there is ample evidence from which discrimination can be inferred. Summary judgment thus is inappropriate on this issue.[13]

C. Retaliation

Defendants state (Mem. at 14), in another misrepresentation, "Each of the acts of purported retaliation . . . occurred after the filing of the EEOC Complaint, and, *therefore, after Dr. Hooper's discharge from employment* (emphasis added). The fact is the acts occurred *before* Dr. Hooper's employment ended. As defendants themselves recognize (Mem. at 15 n.4), "Dr. Hooper's notice of termination, dated August 20, 1991, states that his termination will take place in 'sixty days.'" Thus, Dr. Hooper was not severed from employment until October 19, 1991. *See*, Exh. 2 (attached hereto). The alleged acts occurred while he was an employee. ,

While we question the soundness of *Polsby* v. *Chase*, 970 F.2d 1360 (4th Cir. 1992), petition for a writ of certiorari pending (No. 92-966), on which defendants rely,[14] it is not necessary for this Court to wrestle with the issue since Dr. Hooper was an employee when the retaliation occurred. Defendants would have this Court extend the holding in

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[13] As stated, *supra*, n.8, we have been precluded from inquiry into consultations with MMG's counsel with regard to the drafting of a buy/sell agreement. What other evidence might be disclosed by those consultations at the time Dr. Hooper was a director and one of the persons for whom the agreement was to be drafted we, of course, do not know.

[14] As the *Polsky* Court observes, its decision is at odds with "most circuits addressing this issue [which] have interpreted 'employee' to include a former employee" (970 F.2d at 1365). The Clerk's Office of the United States Supreme Court informed counsel on April 7, 1993, that the case had been conferenced on March 26, and that the Supreme Court has requested the record.

Polsky to define a former employee as an employee who has been given notice of termination. *Polsky* does not stand for that proposition, or even suggest support for it.

Significantly, defendants admit the conduct complained of occurred after plaintiff's EEOC charge was filed. They do not deny the conduct was retaliatory.

The analysis of a retaliation charge follows the *McDonnell Douglas* formula (*see*, *Lewis* v. *AT&T Technologies, Inc.*, *supra*, 691 F.Supp. 915, 921-922 (D.Md. 1988):

(1) engagement in protected activity;

(2) awareness of the employer of the protected activity;

(3) adverse action by the employer against the person engaging in the protected activity;

(4) causal connection between the adverse action and the protected activity.

"The most important circumstantial evidence is proximity in time and deviation from normal employment practices, policies, or procedures." Ruzicho, Jacobs, and Thrasher, *Employment Discrimination Litigation* (Anderson Pub. Co. 1989) §1.27 at 26-27.

The actions of defendants clearly meet the criteria for finding retaliatory conduct.[15] Defendants do not deny this.

[15] The protections of the anti-retaliation provisions of the ADEA do not depend on whether the charge with respect to the underlying discrimination ultimately is found meritorious. *See*, *Pettway* v. *American Cast Iron Pipe Co.*, 411 F.2d 998, 1004-1007 (5th Cir. 1969).

The complained of acts occurred after defendants were notified of the charge related to employment matters, and were a deviation from MMG's normal employment practices. See, Hooper Aff., A. 8-9.

D. Breach of Contract -- The Leave of Absence Agreement

Defendants' contention that the memorandum agreement between Dr. Hooper and MMG is not a binding contract simply is incorrect.

In the first place, the document is *signed*, not initialed, by Dr. Withrow (W. Dep. at 36-37), who was President of MMG, and who had been given authority to deal with Dr. Hooper. In addition, according to Dr. Withrow (Withrow Dep., A. 105), she took the signed memorandum to the Board of MMG, which "chose to accept" it (Withrow Dep., A. 111). Furthermore, MMG confirmed the agreed leave of absence by circulating memoranda, with Board approval, stating that Dr. Hooper was on a leave of absence. (A. 228).[16]

Secondly, the agreement does not, as MMG contends, lack essential terms so as to make it an unenforceable agreement[17]. The essential terms are there -- a leave of

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16 MMG's contention that there was not a meeting of minds is incorrect as a matter of law. There is clearly a binding agreement. The most MMG could argue is that whether there was a meeting of minds presents a question of fact. Even were that so, the presence of such a factual issue would preclude summary judgment. *See, Charbonnages De France* v. *Smith, supra*, 597 F.2d at 414-415.

17 Neither *Moran* v. *Hammersla*, 188 Md. 378, 32 A.2d 727 (1947), nor *Myers* v. *Josselyn*, 212 Md. 266, 129 A.2d 158 (1957) (Mem. at 21), supports defendants' contention. *Moran* deals with an alleged lease which failed to provide the length of the term -- an essential element of a lease. *Myers* involves the absence in an alleged agreement of an exact amount to be included in a bonus calculation -- an essential term of such an agreement. The terms defendants claim are missing

absence "while the attorneys, accountants and Board of Directors work out an acceptable buy out of [Dr. Hooper's MMG] stock." The document also states, "This is *not* a resignation" (emphasis in original). The contract does not consider each and every contingency. However, anticipation of every contingency is not required for a legally binding agreement. MMG's argument simply fails when ordinary Hornbook principles of contract law, known by first-year law students, are applied. We set forth below the applicable principles.[18]

> 1. "When the parties to a bargain sufficiently defined to to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable is supplied by the Court." *Restatement (Second) Contracts* § 204.
>
> 2. "Implied terms of a contract are utilized . . . to supply the place of missing terms." 5A *M.L.E.* "Contracts" § 171 at 309.

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from this agreement are not terms essential to validity. Similarly, MMG's reliance on *In re: W.S.M. Enter., Inc.*, 102 B.R. 461 (Bankr. D.Md. 1989) is misplaced. The agreement here at issue clearly is not an employment contract terminable at will.

[18] MMG contends that the term "acceptable buy-out" is so vague as to make the contract unenforceable. That simply is incorrect. Obviously, the term means "mutually acceptable." "The question of the meaning of the contract may be submitted to the jury when the surrounding circumstances create a doubt as to the meaning of the contract." 5A *M.L.E.* "Contracts" § 180 at 325-326. Moreover, evidence outside the instrument may be introduced to resolve an ambiguity "and where the evidence is conflicting, it presents a mixed question of law and fact, and should be submitted to the jury for their determination, upon proper instructions by the Court." *Id.* at 326.

> 3. "As a general rule, the construction which the parties . . .have given to [a contract] by their acts and conduct may be resorted to in order to determine the real meaning of the contract." *Ibid.* § 174 at 314.
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> 4. "There is an implied provision in every contract that neither party to the contract will do anything to prevent performance thereof by the other party or which will hinder or delay him in his performance. Also, there exists in every contract the implied covenant that each of the parties will act in good faith and deal fairly with each other." *Ibid.* § 171 at 308-309. "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement." *Restatement (Second) Contracts* § 205.

As stated above, the terms of the contract were sufficiently definite. There were to be good faith negotiations to buy-out Dr. Hooper's stock. The period of time the leave of absence was to be in effect was until good faith negotiations failed, or, at the least, a "reasonable time" of good faith negotiations. As stated above, MMG failed and refused to negotiate.

> In the absence of express agreement to perform a contract within a certain time, a reasonable time will be implied . . .

> Generally, what is a reasonable time depends on the facts of each case. 5A *M.L.E.* "Contracts" § 214 at 343.

The fact is that MMG never negotiated. It failed to get back with any price for the stock and failed to negotiate in good faith by demanding a general release of liability from Dr. Hooper and refusing to release him from liability. In short, MMG refused to act in good faith, and it hindered performance.

MMG's contention that the April 18 agreement is not supported by consideration also is incorrect. MMG wished Dr. Hooper to leave. He agreed to take a leave of absence while the final terms were being worked out. MMG got Dr. Hooper out of the office in exchange for its promise that he would be maintained in a leave of absence status and that there would be good faith negotiations to purchase his stock. Plainly, a promise for a promise is valid consideration. Moreover, "[i]n Maryland *either* detriment to the promisor or benefit to the promisee is sufficient valuable consideration to support a contract." *Shimp* v. *Shimp*, 287 Md. 372, 385, 412 A.2d 1228, 1234 (1980) (emphasis in original). Thus, *Shimp*, cited by defendants (Mem. at 22), actually supports the validity of the April 18 agreement. *See*, *Shimp supra*, 287 Md. at 385-386, 412 A.2d at 1234-1235. MMG admits a benefit to Dr. Hooper from the agreement.

E. The 1989 Oral Contract

Defendants' contention (Mem. at 22-25) that the oral contract between defendants Karesh, Dolinsky, Perrino, Baier, and Juarbe is unenforceable also does not withstand scrutiny. The oral agreement contains all the elements necessary for a valid and enforceable contract.

Obviously, in the setting of this kind of closely held, partnership corporation, the agreement to keep Dr. Hooper as President while the IRS loan remained unsatisfied included an agreement not to terminate his employment. Of course, the thought of being fired "didn't cross [Dr. Hooper's] mind", and there was no discussion of the possibility (Mem. at 23).[19]

Nor did Dr. Hooper waive the agreement by acquiescing in Susan Withrow's election as President.[20] He did not vote for her initially and merely acquiesced once the matter was a *fait accompli*. This simply is not a waiver.

Defendants' reliance on law that deals with the waiver of the right to dissent by a director who voted for an action is misplaced. What that body of law deals with is the right of a director to attack *corporate* action by the corporation itself. It has no bearing on any waiver of agreements with individuals. The agreement here at issue is the promises of individuals, not a corporate obligation.

Similarly, defendants (Mem. at 24-25) take paragraph 5 of the Indemnification Agreement out of context. Read in

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[19] The fact that termination of employment did not cross Dr. Hooper's mind is reasonable. Such understanding is confirmed by paragraph 2 of the Agreement of January 24, 1990, which is attached to Dr. Perrino's affidavit (submitted by defendants). Paragraph 2 at page 4 of the Agreement promises payment of "a guarantee fee and bonuses to Stockholders . . . in recognition of risks and exposure of their personal assets pledged as security for payment of the corporate debt, as well as their commitment and dedication to the practice." The paragraph also excludes "[a]ny Shareholder who terminates [presumably voluntarily] his association with MMG or the medical practice before the bank loan is satisfied." *See also, infra.*

[20] *Fairchild Stratos Corp.* v. *Siegler Corp.*, 225 F.Supp. 135 (D.Md. 1963), cited by defendants (Mem. at 24), is irrelevant. The contract here at issue does not deal with deliveries of goods or a machine with no objection being made during testing. There is no similarity.

the context and with the purposes of the Agreement in mind, it is obvious the paragraph is referring to indemnification agreements between the parties, nothing more. *See also*, n.19, *supra*. Taking defendants' argument to its logical conclusion, paragraph 5 would have canceled and replaced the signatories' employment contracts with MMG. Plainly, defendants do not read paragraph 5 in that way, as they specifically rely on Dr. Hooper's written employment agreement with MMG. *See*, *e.g.*, Mem. at 13.[21] However, if paragraph 5 replaces all agreements, as stated, *supra*, n. 21, there was implicit limitation of MMG's rights to terminate employment.

F. Fraud

The evidence supports an inference that Dr. Hooper was fraudulently induced to pledge his home as a guarantee for the IRS loan. "Maryland has adopted the overwhelming rule of the American courts in holding that fraud may be predicated on promises made with a present intention not to perform them." *Tufts* v. *Poore*, 219 Md. 1, 11, 147 A.2d 717, 723 (1959).

> A fraudulent pre-existing intent not to perform a promise cannot be inferred from the failure to perform the promise alone. [Citation omitted.] But, it may be considered with the subsequent conduct of the promisor and the other circumstances surrounding the transaction in sustaining such an inference. [Citations omitted.] And it has been stated that under certain conditions, a failure or refusal to perform is strong evidence of an intent not to

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[21] Paragraph 2 of the Agreement which is referenced in n.19, *supra*, can be read to limit the right of MMG to discharge any shareholder, or, at the least, such a limitation for discharge without cause. Defendants consistently have asserted that Dr. Hooper was not dismissed for cause. *See*, Mem. at 13.

> perform the promise at the time it was made, as where only a short period of time elapses between the making of the promise and the failure or refusal to perform it, and there was no change in circumstances.
>
> ***
>
> In valuing facts relating to the question of a present intention not to perform, courts frequently stressed the importance and significance of the situation of the parties, the relations existing between them, the activity of the promisor in procuring the instrument, and the failure of the promisor to perform.

Ibid, 219 Md. 219 at 10-11, 147 A.2d at 722. *And see*, *Wilson* v. *S & L Acquisition Co., L.P.*, 940 F.2d 1429, 1440 (11th Cir. 1991).

Here, MMG and the Individual Defendants desperately needed the loan. Dr. Hooper was the only one who stood a chance of procuring it. The only way he would agree to do so were if he were assured he would remain President of MMG until satisfaction of the loan. The five Individual Defendants approached Dr. Hooper about returning as President. They did so based on advice of counsel that it was not desirable to change officers while the IRS matter remained unresolved. At the first opportunity after they obtained the loan, based on Dr. Hooper's guarantees, which were critical to obtaining the loan, they removed Dr. Hooper as President of MMG and then began a campaign to get him to abandon his employment. The inference of fraud is not simply permissible. It is compelling.[22]

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[22] We sought to discover the conversations with MMG's attorneys with regard to the advisability of keeping Dr. Hooper as President in 1989. Magistrate Judge Kenkel held those conversations privileged. Objections are pending before this Court. For reasons advanced before

And, that is especially so since there was not only no change in circumstances at MMG form the time the loan was obtained until September, 1990, but, in fact, MMG was meeting its commitments and was prospering. *See*, Perrino Dep., A. 155-156.

Defendants' statement (Mem. at 26-27) that Dr. Hooper has not suffered damage as a result of the fraud is incorrect. The damages have been computed as the differential in the loan rate (assuming MMG could have obtained the loan without the security Dr. Hooper provided) and the rate it obtained. *See*, A. 211.[23]

G. Breach of Fiduciary Duty

Defendants contend that because MMG is not a "close corporation", as defined by the Maryland Code primarily for certain intra-corporate procedural purposes, no fiduciary duties existed between and among the stockholder/officer/directors of MMG. Again, they are mistaken.

The terms "close corporation" and "closely held corporation" are used interchangeably by the cases imposing fiduciary duties on the stockholders of closely held

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Judge Kenkel and in our Objections, we believe the ruling is error. (Dr. Hooper was at all relevant times a Director of MMG, and the consultations were with counsel to MMG.) It may be those conversations would provide further, or even direct, evidence of fraud. Should the Court believe the evidence presented insufficient to create a jury question on the fraud issue, a ruling regarding summary judgment on the matter should be postponed until our Objections have been considered. In any event, the requested discovery should be permitted prior to trial.

[23] It is our understanding the IRS loan has been paid in full by MMG. Obviously, Dr. Borzilleri's figures on the amount of damages now need to be revised downward. There are less damages, but there are damages.

corporations. The term "close corporation" is not used as narrowly and specifically defined in the Maryland Code. *Black's Law Dictionary* (6th ed.1990) at 341 defines "close corporation" as follows:

> A corporation whose shares . . . are held by a single shareholder or a closely-knit group of shareholders. Generally, there are no public investors and its shareholders are active in the conduct of the business.

In this instance, the "business" is a medical practice -- a professional corporation. In essence, MMG is a partnership of practicing physicians. *See, Hartung* v. *Architects Hartung/Olde/Burke, Inc.*, 301 N.E.2d 240 (Ind. App. 1973). The corporation there was an architectural firm as to which the Court stated (301 N.E.2d at 243):

> As to the existence of a fiduciary duty, the evidence shows that Hartung was a director, an officer, and one of only three shareholders of the corporation. A fiduciary duty attached to Hartung in each capacity. . . . [T]he shareholders in a close corporation, also referred to as an "incorporated partnership", stand in a fiduciary relationship to each other.

Thus, "stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another . . . [and] this strict good faith standard [measures] . . . their duty of loyalty to the other stockholders and to the corporation" (footnotes omitted). *Cain* v. *Cain*, 334 N.E.2d 650, 654 (Mass. App. 1975), quoting from *Donahue* v. *Rodd Electrotype Co. of New England, Inc.*, 328 N.E.2d 505, 515 (Mass. 1975) (brackets and deletions by the Court). *To like effect, see, e.g., Dresden* v. *Willcock*, 518 F.2d 281 (3d Cir. 1985); *Helms* v.

Duckworth, 249 F.2d 482 (D.C. Cir. 1957); *Orchard* v. *Covelli*, 590 F. Supp. 1548, 1557 (W.D.Pa. 1984); *Evans* v. *Blesi*, 345 N.W.2d 775 (Minn. App. 1984).[24]

The situation here ia quite similar to that presented in *Evans* v. *Blesi, supra*. There, a majority shareholder sought to drive out his partner by intimidating tactics. Here, as stated, *supra*, the Individual Defendants sought by their conduct to drive Dr. Hooper out, deprive him of his income and interest in MMG, and to appropriate his Panels of patients to themselves. They breached obligations incumbent upon them as "partners" in a closely held corporation, entered into a leave of absence agreement they dishonored in bad faith, and breached the implied obligations of their indemnification agreement *re* the IRS loan. *See, supra*, nn. 19, 21. Moreover, all of this was done after fraudulently inducing Dr. Hooper to pledge his home to secure a loan, or at the least, deliberately breaching an agreement relating thereto. Their intent was made plain by Dolinsky's statement, *supra*, that it was only a "matter of time", now that they had "younger blood running the corporation" before they got "rid of" Dr.Hooper's "old ass completely."

H. Conspiracy

"A civil conspiracy is a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with the further requirement that the act or the means must result in damages to the plaintiff." *Green* v.

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[24] Defendants' reliance on *Goodman* v. *Poland*, 395 F. Supp. 660 (D. Md. 1975) is misplaced. The case arose under Section 10(b) of the Securities and Exchange Act. Plainly it does not deal with rules applicable to closely held corporations. The two Maryland cases (Mem. at 31) cited also do not deal with a closely held corporation like MMG, and they deal with responsibilities of directors, not responsibilities of shareholder/partners to one another.

Wash. Sub. San. Comm'n, 259 Md. 206, 221, 269 A.2d 815, 824 (1970). "An 'unlawful act' . . . in a civil conspiracy is not necessarily a criminal act." *Columbia R.E. Title Ins. Co.* v. *Caruso*, 39 Md. App. 282, 288, 384 A.2d 468, 472 (1978). "'[U]nlawful act' connotes a tort, or a breach of contract, or other *actionable* wrong." *Ibid.*, 39 Md. App. at 289, 384 A.2d at 472-473 (emphasis in original). Here that unlawful act was the breach of fiduciary duty outlined above, as well as breaches of contracts.

The evidence establishes that the Individual Defendants were constantly meeting and conferring, and excluding Dr. Hooper from those meetings, and were taking secret financial actions. *See*, Dolinsky Dep., A. 67; Perrino Dep., A.164-167. Such meetings were taking place in the office, and at least one such meeting was held at Harvey's Restaurant. *See*, Rankin Dep., A. 185-190, 195-196; Miles Dep., A. 207-208.

> In a civil case not involving a criminal act, conspiracy may be shown by a preponderance of the evidence and may be proved by circumstantial evidence since almost never is direct evidence available. Conspiracy may be shown by inferences drawn from the nature of the acts complained of, the individual and collective interests of the alleged conspirators, the situation and relation of the parties, their motives and all surrounding circumstances preceding and attending the culmination of the common design. In essence the rule is that the plaintiff may prevail if men of sound mind may reasoningly and reasonably deduce from the facts and circumstances presented to them that there was a conspiracy.

Daugherty v. *Kessler*, 264 Md. 281, 292, 286 A.2d 95, 101 (1971). *To like effect, see, De Long Equip.* v. *Washington Mills Abrasive Co.*, 887 F.2d 1499, 1515 (11th Cir. 1989).

The evidence is plainly sufficient to permit the conclusion of a civil conspiracy. As stated above, the burden of proof in such a case is simply a preponderance of the evidence.

I. ERISA

1. MMG was contacted regarding the pension plan calculations (A. 224-225). It simply did not respond in any meaningful fashion until after it was served with a proposed amended complaint. *See*, A. 222-223.

At the hearing on the motion for leave to amend, MMG's counsel provided plaintiff's counsel with a copy of the claimed resolution to recalculate. Counsel had no way to confirm or examine the action, and to this date has not been provided with information sufficient to confirm MMG's calculations.[25]

2. Assuming, *arguendo*, that MMG has agreed to provide the relief prayed for in the Complaint, the Fourth Circuit has made it plain that plaintiff should be awarded attorney's fees. "A prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render an award unjust.'" *Bonnes* v. *Long*, 599 F.2d 1316, 1318 (4th Cir. (1981), quoting from *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). *See also, Bonnes* v. *Long*, 651 F.2d 214 (4th Cir. 1981). There simply

[25] We suggest MMG be ordered to provide information sufficient to determine the accuracy of the calculations. If the calculations are accurate and payments are made, Count VIII is resolved except for the issue of attorney's fees.

are no special circumstances that justify denying fees. *See, Bonnes, supra*, 599 F.2d at 1318 (discretion of court "narrowly limited"; and consent judgment does not preclude fee award). See, also, generally, 1 Derfner and Wolf, *Court Awarded Attorney Fees* (Matthew Bender 1987) § 9.02 at 9-2-- 9-26.

Any doubt about the propriety of a fee award in this case is dispelled by *Rodriguez* v. *MEBA Pension Trust*, 956 F.2d 468 (4th Cir. 1992).[26] "*Reinking* [v. Philadelphia Am. Life Ins. Co., 910 F.2d 1210 (4th Cir. 1990)] . . . effectively mandated a presumption favoring prevailing ERISA plaintiffs" (*Ibid.*, 956 F.2d at 471). The Fourth Circuit again states the five criteria determining the propriety of a *See* award in an ERISA case:

(1) degree of culpability or bad faith of the party resisting the claim;

(2) ability of the opposing party to pay;

(3) deterrence effect of the award;

(4) whether the party seeking the fee sought to benefit others or resolve a significant legal question; and

(5) relative merits of the parties' positions

(*Ibid.* at 470).

In short, *Rodriguez* and *Bonnes* make plain that the discretion to deny a fee award to a successful ERISA plaintiff

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[26] *Rodriguez* was argued and won by Albert D. Brault who is listed as counsel on defendants' motion and memorandum in this case, and who has participated in this case. We are puzzled that *Rodriguez* is not even mentioned by defendants.

is quite narrow, and that no one factor is controlling. Moreover, *Rodriguez* makes clear that bad faith is not required to justify a fee award, and that failure to respond to inquires creates sufficient culpability, stating that "breach of a fiduciary duty, even if it does not amount to bad faith, surely contemplates 'culpability' within contemplation of the five-factor test" (*Ibid.* at 472).

In the instant case, there is no question plaintiff achieved the result sought, that MMG did not timely respond (A. 215-225), that there is a deterrence effect, that MMG has the ability to pay, and that others were benefited by Dr. Hooper's action (A. 226-227); Def. attachment to Perrino Aff.). In short, MMG's argument simply is wrong.

III. CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment should be denied.

Respectfully submitted,

S/ Allen H. Sachsel
ALLEN H. SACHSEL
Counsel for Plaintiff
10603 Judicial Drive
Fairfax, Virginia 22030
(703) 385-9400
Bar No. 09272

CERTIFICATE OF SERVICE

I certify that on April 16, 1993, I caused a copy of the foregoing Opposition and accompanying Appendix to mailed, first class, postage prepaid, to Jeffrey M. Schwaber, Esquire, and David G. Mulquin, Esquire, at their respective addresses of record.[27]

S/ Allen H. Sachsel
ALLEN H. SACHSEL

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[27] We moved for a four day extension of time to serve and file this Opposition. The motion was opposed separately by MMG and the Individual Defendants. MMG objected, at least in part on the ground that its motion was so strong it wanted an immediate ruling, which a four day extension could delay. Apparently, it does not intend to participate in good faith in a Settlement Conference set for April 26, 1993. *See*, our Reply to MMG's Opposition. A day after MMG served its Opposition, the Individual Defendants served a separate Opposition, adopting MMG's Opposition and also complaining that if our opposition to the summary judgment motion is hand-delivered on April 16, 1993 (the date of the extension we had sought), the Reply to the summary judgment opposition would be due on April 27, a day after the Settlement Conference and thus would interfere with its preparation for that Conference. As of this writing, no ruling on our extension motion has been received. Not knowing which of the defendants to attempt to please, we have served this opposition by mail, thus giving defendants the option of an April 30 due date for a reply, or the option of filing the Reply before its due date. Since defendants consider their Summary Judgment motion so strong, filing a Reply before its due date should pose no difficulty for them.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

AFFIDAVIT

1. I am James L. Hooper, M.D., the plaintiff in the captioned case.

2. I am over the age of 18 years and am competent to testify.

3. I make this affidavit on personal knowledge in opposition to Defendants' Motion for Summary Judgment.

4. In 1964, I founded what was known as Montgomery Medical Group, P.A. The practice was founded in Gaithersburg, Maryland. It was moved to Rockville, Maryland in 1986. (In April, 1993, the name of the corporation was changed to Perrino, Dolinsky, Karesh, Withrow, Juarbe, & Baier, M.D., P.A.)

5. All of the persons named individually as defendants ("Individual Defendants") in this case were hired by me.

6. MMG technically was a professional corporation. It issued shares of stock, held stockholders' meetings, elected board members, and had officers. However, the election of board members was not the typical corporate set-up. At the

time each stockholder bought into the practice, he or she was assured membership on the board of directors, and as such had an equal voice in the running of the practice. This was regardless of the number of shares the person owned. (The number of shares was determined by the hours the "partner" was scheduled to work.) Thus, "partners" who worked full-time owned 50 shares each, while "partners" who worked 3/4 time owned 37 1/2 shares, each.)

7. None of the shares of MMG, or its predecessors, ever were acquired by any person who was not actively engaged in, and employed by, the practice. It was understood this was a requirement for owning stock.

8. If a partner physician left MMG, it was the practice for the corporation to repurchase the stock, with its value computed in the same manner as the buy-in had been calculated. (There was not a formal buy-sell agreement among the "partners"; however, this was an unwritten understanding, which had been honored in the past.)

9. From the inception of the practice until May, 1989, I was the President.

10. In May, 1989, I resigned as President of MMG because I was displeased with the way my partners had dealt with an employee.

11. At that time (May, 1989), MMG owed a substantial sum to the Internal Revenue Service ("IRS") for unpaid employment taxes. (The tax liability had been incurred without the knowledge of any of the partners (including me), and the IRS claimed individual liability of all partners since all had check signing authority.) MMG was at that time negotiating with the IRS, through counsel, arrangement for payments. At the same time, MMG was negotiating with banks to attempt to procure a bank loan to satisfy the

obligation. At that time, it was known that personal guarantees by the "partners" and personal collateral would be required. I also knew from talking with a banker that my home would be required as collateral, and that no loan would be made without the pledge of my home. My home was worth a number of times what the home of any other partner was worth. I said at that time I would not guarantee any loan to MMG and actually struck out my signature on certain loan related documents.

12. I was not President of MMG for a brief period in May, 1989. (This is the only time I was not President of MMG or its predecessors from its inception until September, 1990, when I was voted out as President. *See, infra*. During the entire period from inception to July 31, 1991, I was a Director of MMG.)

13. Shortly after I resigned as President in May, 1989, one or more of my partners came to me and asked me to return. I agreed to return and guarantee the loan for the IRS if I were assured I would remain President at least until any loan taken to pay the IRS was satisfied. Five of my six partners (excluding Susan Withrow, who refused to agree) promised me that I would remain President of MMG at least until the loan was paid. Based on these promises, I agreed to return as President of MMG, agreed to, and did guarantee the loan, including the pledge of my home as collateral.

14. The loan to satisfy the IRS was obtained in early 1990. As I had agreed, I guaranteed the loan and pledged my home as security.

15. In September, 1990, at the very first election of officers held by MMG after I had guaranteed its loan, based on the assurance I would remain President until the loan were satisfied, I was voted out as President of MMG, even though the loan was not satisfied. Thus, the five partners who had

promised to retain me as President at least during the life of the loan, and on whose promised I had relied in guaranteeing the loan, breached their agreement with me by voting for Susan Withrow to be President.

16. From the time the IRS indebtedness was discovered until September, 1990, MMG had been profitable and had maintained a positive cash position. It had paid approximately $30,000 per month to satisfy penalties the IRS claimed.

17. At the meeting in September, 1990, at which I was voted out as President, and at which Susan Withrow was elected President, Dr. Withrow was nominated by Steven Dolinsky, one of the partners who had induced me to guarantee the loan for the IRS obligation. After all of my partners had voted for Dr. Withrow to be President, I said I would go along with it. It was a *fait accompli* at that point, and I did not wish to create further division in the practice.

18. From the time Dr, Withrow was elected as President of MMG, MMG, through Withrow and the other partners, began a campaign of harassment. Among other things, I was addressed in a hostile and condescending manner at partners' meetings, was asked to vacate the office I had occupied for years, was directed to work in a satellite office 20 miles away, was denied keys to the office I had founded, received sarcastic memoranda, and was denied access to financial information. In addition, my partners held what were[,] in effect, secret board meetings from which I was excluded.

19. By Spring of 1991, the other partners made it plain they wished me to leave.

20. In a conversation of about April 12, 1991, with Susan Withrow, she agreed it was desirable that I leave MMG

and that I would be on a leave of absence while a buy-out of my stock at a mutually acceptable figure were worked-out. (I had agreed I would leave if a buy-out of my stock were worked out.) On April 18, 1991, I wrote a memorandum to Susan Withrow memorializing our oral agreement. *See*, Compl. Exh 1. She looked at it, and said, "Jim, this fine. Sign it." I asked if she would sign it, too, and she agreed and did so. (By this time I had cut back my hours with the agreement of MMG and had begun work with Walter Reed Army Medical Center which did not interfere with my schedule at MMG.)

21. MMG and its partners consistently, from September, 1990, onward accused me of doing things damaging to the practice. I was, and always have been, considered a highly competent physician. I had contracts with a number of Health Maintenance Organizations ("HMO'S"). I had more HMO patients than any other physician in the practice, and I consistently produced more revenue for the practice than any other physician.

22. As stated above, I was told my actions were damaging to the practice. During my career, I have not had malpractice claims against me, and I have not behaved abusively or inappropriately toward patients. By contrast, one of my partners was sued for having taken sexual liberties with a female patient and sodomizing her, after overdosing her with drugs in her apartment in the District of Columbia, to which he had gone uninvited. His actions resulted in a suit, which included MMG as a defendant. Moreover, he admitted to me that the allegations against him were true. When I sought to have him dismissed for his outrageous and scandalous behavior, the other partners refused. One of them excused the conduct on the grounds that the conduct was by a young, unmarried man. Another partner, who had a history of poor communication with patients and not returning or making necessary phone calls, was sued for malpractice, along with

MMG, for failing to inform a patient about a suspicious mammogram, which failure may lead to what would have been a preventable cancer death. No action of any kind has been taken against that partner. Both of the above-mentioned partners are in their 40's so far as age is concerned.

23. In the mid-1980's, there were some questions raised by others at MMG about my dealings with attorneys relating to Workmen's Compensation cases. The other partners at that time appointed one of their number to investigate. The investigation failed to show any wrongdoing by me. In any event, the matters questioned were years ago, and I was consistently re-elected as President and was kept employed until the times mentioned in the Complaint in this case and in this Affidavit.

24. I did express anger and frustration over the way I was treated beginning in September, 1990, after the election of Dr. Withrow as President of MMG. Part of the reason is that I knew financial data was being kept from me. At one point at which I lost my temper I was told by Mrs. Dolan, the then Administrator, that if I wanted financial data or information relating to my individual HMO Panels and contracts, I "should ask the owners" of MMG. MMG subsequently refused [to] provide such information.

25. As stated above, even though I knew I was being treated unjustly, and was, in effect being constructively discharged, I decided it might be simpler to leave than to fight. I never received any concrete offer for my stock, and MMG and its partners were insisting that [as] of part of any agreement I give it and them a General Release, while, at the same time insisting it and they would not give me a release.

26. In July, 1991, I received from MMG notice of a stockholders' and directors' meeting at which my employment status was to be discussed. I requested a rescheduling of the

meeting since I had a commitment to be out of town for a medical conference. My request went unanswered.

27. I have been informed that at the July 31, 1991 meetings, my partners voted to terminate my employment, in violation of the April 18, 1991 contract agreeing to my leave of absence.

28. By letter dated August 20, 1991, I was notified that my employment with MMG would terminate 60 days thereafter.

29. In September, 1991, I filed my Charge of Age Discrimination with the United States Equal Employment Opportunity Commission.

30. Almost immediately after the Charge was served, I asked for access to my Panels of patients so that I could pursue the option of going into private practice. MMG never responded to my request.

31. The failure to provide me with access to my Panels was a deviation from MMG policy. Departing physicians had, as a matter of policy, been given access to their Panels of patients so that the patients could choose whether to remain with MMG or with the particular physician the patient had chosen as his or her primary care physician.

32. MMG also failed to make payments on a loan it had me take (along with the other partners) for payment of our individual malpractice insurance premiums. When the loan was taken, it was agreed MMG would make the payments.

33. MMG banned me totally from its premises, while I still had the status of an employee, even for purposes of picking up my personal mail.

34. MMG notified HMO's and hospitals that I was no longer affiliated with MMG prior to the time my employment officially terminated.

35. MMG refused to pay me my last 60 days pay, as provided in my contract of employment.

36. All of the actions taken by MMG and the Individual defendants, as listed in paragraphs 30-35 hereof and in paragraph 24 of my Complaint filed herein were taken after I had filed my EEOC Charge and notified MMG of such filing, and were, to the best of my knowledge, contrary to prior MMG practices.

37. On or about July 31, 1989, MMG terminated its Pension Plan in which I was at participant.

38. MMG was Administrator of the Pension Plan. I was the trustee.

39. The assets of the Pension Plan were not distributed until on or about December 21, 1990.

40. As trustee of the Pension Plan, the firm handling the matter had told me that interest would be paid on the funds to the date of distribution. I told other MMG employees such payment would be made. At least one other person requested such payment through counsel and received no response.

41. MMG failed to have the plan pay interest as promised, and did not agree to pay such interest, despite requests, until after I sought to amend my Complaint in this Court to include an ERISA violation. No action was taken in that regard by MMG until the Complaint was served on MMG and submitted to this Court.

42. To date, MMG has failed to provide me with information to enable me to confirm the accuracy of its calculation of interest due me and other participants in the Pension Plan. (The Complaint seeks a declaratory judgment to benefit all Participants in the Pension Plan.)

I declare under penalty of perjury that the foregoing is true to the best of my knowledge, information, and belief.

_____ /s/ James L. Hooper

Date James L. Hooper, M.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

PLAINTIFF 'S OPPOSITION TO DEFENDANTS' MOTION FOR RULE 11 SANCTIONS

Defendants' motion is entirely lacking in merit. This case was brought and continued in good faith with proper legal and factual investigation. *See*, annexed affidavits of Sachsel and Miller, and affidavit of Nagle annexed to our motion for attorney's fees. The arguments advanced are "warranted by existing law or a good faith argument for the extension, [or] modification of... existing law, and... not interposed for any improper purpose" (FRCP Rule 11).[1]

[1] Counsel, who has been admitted to practice since 1963, who has worked for a number of U.S. Government agencies (including the Department of Labor, the Equal Employment Opportunity Commission, the National Labor Relations Board, the Occupational Safety and Health Review Commission, and the Department of Justice), and who has been involved in handling cases privately since 1979, is more than outraged at defendants' suggestion that no competent attorney would have proceeded with this case.

Defendants' counsel have a history of personally attacking undersigned counsel. Shortly before the trial of *Cooper* v. *Hooper, Withrow, and MMG* in the Montgomery County Circuit Court (the case on which defendants based their disqualification motions in this case) Millard Bennett, a partner in Stein, Sperling, after Dr. Withrow was elected President of MMG, asked for a meeting with undersigned counsel to discuss the status of the Cooper case. At that meeting, which also was attended by Dr. Withrow and others from Montgomery Medical Group,

I. APPLICABLE PRINCIPLES

"There is a strong presumption against imposing sanctions for invoking the processes of law." *Lefebve* v. *C.I.R.*, 830 F.2d 417, 420 (1st Cir. 1987), citing *Talamani* v. *Allstate Insurance Co.*, 470 U.S. 1067, 1072 (1985). "Rule 11 is intended to deter claims with *no* factual or legal basis at all; creative claims, coupled even with ambiguous or inconsequential facts, may merit dismissal, but not punishment." *Davis* v. *Carl*, 906 F.2d 533, 538 (11th Cir. 1990) (emphasis in original). Thus, a district court properly should not impose Rule 11 sanctions where the party against whom sanctions are sought had even " 'a glimmer of a chance of prevailing.'" *Hoover Universal, Inc.* v. *Brockway Imco, Inc.*, 809 F.2d 1039, 1044 (4th Cir. 1987); *Baker, Watts & Co.* v. *Miles & Stockbridge*, 690 F.Supp. 431, 437 (D.Md. 1988).

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and a member of Brault, Graham, Scott & Brault, Mr. Bennett and another Stein, Sperling partner, Donald Sperling, interrogated, in a degrading way, undersigned counsel regarding his background and qualifications to handle the Cooper case. Thereafter, Albert D. Brault filed a motion in the Cooper case seeking a continuance of the trial date so that he could be substituted as counsel for Dr. Withrow and MMG. Chief Judge Mitchell of the Montgomery County Circuit Court denied the motion. Subsequently, counsel was told that Stein, Sperling had told Dr. Withrow and MMG that undersigned counsel was not competent to handle the Cooper case. Millard Bennett denied the allegation. The Cooper case was tried. Judgment was entered for the defendants.

As the Court is aware, the same two firms challenged undersigned counsel's professional ethics at the outset of this case, seeking his disqualification. That motion, too, was unsuccessful. *See also, infra*, p.11

We suggest to the Court that repeated and unfounded personal attacks on counsel should not be condoned. We believe such actions themselves to be both unprofessional and unethical.

Moreover, even in cases where some sanction is appropriate, it does not follow that the prevailing party "automatically is entitled to an award of attorneys' fees", and "'[t]he basic principle...is that the least severe sanction adequate to serve the purpose should be imposed.'" *Cabell* v. *Petty*, 810 F.2d 463, 466-467 (4th Cir. 1987), quoting from Schwartzer, "Sanctions Under the New Federal Rule 11--A Closer Look", 104 F.R.D. 181, 201 (1985) (brackets and deletions by the Court). To like effect, *see*, *Pony Exp. Courier* v. *Pony Express Delivery*, 872 F.2d 317, 319 (9th Cir. 1989). *See, Miltier v. Downes*, 935 F.2d 660, 665 (4th Cir. 1991), stating the foregoing, emphasizing that Rule 11 is not a Rule for the shifting of fees, and listing the factors to be considered in determining sanctions, where sanctions are appropriate.

We set forth below as to the various Counts of the Second Amended Complaint ("Complaint") reasons sanctions are inappropriate, without repeating in detail the arguments made in our opposition to the summary judgment motion. In so doing, we do not abandon any argument or contention previously advanced by us, or any other argument or contention, and specifically preserve all such arguments and contentions.

II. AGE DISCRIMINATION

The Court has ruled (we believe erroneously) that plaintiff failed to present issues of material fact which justify submission of his Age Discrimination claim to a jury. That does not mandate a conclusion the claim is either frivolous, or that the suit was brought in bad faith.

It was undisputed that Dr. Hooper was the oldest "partner" in the practice and that he was treated unfavorably. Dr. Hooper also testified that on at least two occasions comments about his leaving the practice alluding to his age

were made to him. The Complaint also alleges that Dr. Hooper's conduct was constantly criticized as being damaging to the practice, whereas outrageous and scandalous conduct, including inappropriate sexual advances toward a patient by a younger partner were excused, at least in part, on the basis of the offending doctor's youth and marital status.[2] Not only was there this evidence, but, in addition, and perhaps most significantly, there was a direct statement regarding Dr. Hooper's replacement as President of MMG, with "younger blood" and plans to get rid of his "old ass completely."[3] Thus, contrary to what defendants represent and what the Court concluded, there is, at a minimum, evidence from which a good faith argument could be, and was made, that age was a factor in the adverse actions taken against Dr. Hooper.[4]

Defendants also seem to rely on the Court's finding that Dr. Hooper was not replaced by anyone to show that plaintiff had no chance of success. However, as the Court recognized at oral argument, if the action was motivated by a proscribed factor, the mere fact that a plaintiff was not

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[2] Magistrate Judge Kenkel ruled we could not discover into this area. Timely Objections were filed. The Court granted summary judgement without ruling on the Objections to these and other rulings of Judge Kenkel. The information sought could have led to discovery of other evidence of discrimination. *See*, papers nos. 35 and 42 (12/14/92). (Rather than reproduce again papers already of record, we refer to them by docket entry number and date of filing. For convenience, a copy of the docket entries is attached hereto.)

[3] The Court states we do not claim age was a factor in replacing Dr. Hooper as President. That is incorrect. What we have said is that we were not seeking relief or damages for that action and that the evidence shows the discrimination began with that action.

[4] We are aware of the cases cited by the Court to the effect that isolated comments standing alone are not enough to establish proscribed motive. As we read those cases, the comments were general. Here, the comments specifically related to plaintiff and to the particular course of conduct followed by defendants.

replaced does not preclude a finding of unlawful discrimination. As stated above, there was direct evidence of a legally proscribed motive which the Court interpreted so as not to find discrimination.[5]

In short, Count I was neither brought nor maintained in violation of Rule 11. While for reasons stated above, as well as other reasons, we believe the Court's grant of summary judgment on this Count was error, that is not the issue here. The sole question for Rule 11 purposes is whether the action was brought for an improper purpose with no basis, or whether the law and the facts were such as would require a competent attorney to conclude that there was not even "a glimmer of chance of prevailing."[6] Neither is the case.

III. RETALIATION

Plaintiff 's case plainly established that after defendants were notified that Dr. Hooper filed his case with EEOC, they took actions against him in violation of set agreements and established policy. There was, and is, a basis for legitimate argument that the Charge caused the actions. While, unquestionably, defendants had taken actions against Dr. Hooper prior to the Charge, there still is a question of fact, or

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[5] MMG did request we dismiss the age claim. Dr. Hooper declined to do so based on disparate treatment, and, subsequently, the direct of evidence of motivation provided by Tina Rankin.

[6] We disagree that defendants established they would have taken the same actions against Dr. Hooper, irrespective of age. Defendants offered no such evidence. Moreover, the Court viewed the "old ass" comment as remote in the time while it viewed a letter of apology by Dr. Hooper as evidence of cause for discharge even though it was remote in time from the termination. There was no evidence of cause subsequent to that letter and the discharge about nine months later. Nor is there any evidence that between Hooper's letter and the letter from David Elling harassment of Dr. Hooper had ceased. In fact, it had not.

at the least, arguably a question of fact, as to the motivation for particular actions alleged in the Complaint.

IV. BREACH OF CONTRACT

The contention that plaintiff 's contract claim in Count III is such that no attorney of competence would have brought, frankly, is itself not made in good faith. Plaintiff had a signed document--signed by him and the President of MMG--in which it was stated that Dr. Hooper would be on a leave of absence while a buy-out of his stock was worked out. The evidence showed there was no attempt to work out a buy-out, and that Dr. Hooper was terminated.

In the initial telephone conference in this case, the Court informed defendants, based on its review of the Complaint[7] and attachment, that it did not see how MMG would "get out of that breach of contract." The fact is that there was a signed document. Dr. Withrow attempted to avoid its effect in her testimony. The Court chose to believe Dr. Withrow and adopt her interpretation, even though she took the document to the other Board Members, and all of them close to accept it. Totally apart from the fact that we believe the Court went beyond its proper role in ruling on a summary judgment motion, there is no basis for sanctions with respect to Count III.

V. COUNTS IV AND V

Neither Count IV nor V was brought until there had been substantial discovery.[8] Dr. Hooper had told his counsel

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[7] The Complaint before the Court then was the First Amended Complaint. Count III in the Second Amended Complaint is in *haec verba*.

[8] Counts IV through VIII were added in the Second Amended Complaint. Significantly, the amendment was *not* opposed on grounds

of the agreement to keep him on as President of MMG until the bank loan was paid, and that it was on such condition that he agreed to guarantee the loan and secure it with his home. It was undisputed that Dr. Hooper was not voted out as President until the very first election *after* he was instrumental in obtaining and guaranteeing the loan and securing it with his home. Furthermore, the defendants admitted that they wished Dr. Hooper to return as President, after he had resigned his office in 1989, because of his ability to obtain the loan in question. They also stated that Dr. Hooper was critical to obtaining the loan. While all of the defendants denied they made the agreement, in our view, especially since Dr. Hooper had at the time struck out his signature on papers related to the loan, questions of fact for jury resolution clearly were presented. We still believe that to be so.[9]

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the Counts failed to state a claims on which relief can be granted. *See*, paper no. 46 (1/4/93).

[9] The Court concluded it was illogical for there to be an agreement to keep Dr. Hooper as President without an agreement to keep him employed. However, as we pointed out, in the context, and in this medical practice, the agreement necessarily included an employment agreement. For this reason, and based on the expert testimony provided, we maintain there are damages to support a fraud claim. (Damages, of course, are not an element of a cause of action for breach of contract.) Furthermore, based on the cases cited in our summary judgment opposition and the facts, we believed, and do believe, that an inference of fraud--intent not to keep the agreement at the time of making--was and is permissible.

Additionally, the Court relied on its finding that Dr. Hooper voted for Dr. Withrow as President. Without saying so directly, the Court, in effect, concluded that Dr. Hooper waived as a matter of law any claim he might have had with respect to Counts V and VI. We maintained, and do maintain, that a statement after the fact of Dr. Withrow's election that he would "go along with it" was not a waiver as a matter of law. *See*, cases cited in our Notice of Intent to Reply on Additional Authorities (paper no. 69 (5/7/93)).

Furthermore, we respectfully submit that the Court's reliance on

VI. COUNT VI

Count VI plainly presents an argument for the application of a principle of law that has been applied by other jurisdictions. The precise matter has not been addressed by the Maryland Appellate Courts, and defendants have cited no clear precedent, Maryland or otherwise, contrary to the position we have advanced.

In the past, in circumstances in which there was no clear Maryland precedent, this Court has held that Maryland would follow the law generally applicable in other jurisdictions. See, *e.g.*, *Twenty-Seven Trust* v. *Realty Growth Investors*, 533 F.Supp. 1028, 1035, 1036, 1039 (D. Md. 1982). That is all we sought here.

While we believe our position regarding Count VI is in accord with generally applicable law,[10] if the Court had doubts, it would have been more appropriate for the Court to have refrained from ruling on this issue (and Count VII to the extent it relies on Count VI) as a matter of discretion (*see*, 28

Dr. Hooper's liability was inappropriate. It is entirely speculative as to how the I.R.S. would have chosen to enforce liability. Moreover, the asset pledge--Dr. Hooper's home--was held in tenancy by the entirety and would not have been the easiest of assets to reach, even for the I.R.S.

The most defendants were entitled to is a conclusion that there were issues of fact for the jury. In any event, our position certainly is not sanctionable

[10] The Maryland Close Corporation law was intended to confer procedural benefits on qualifying corporations that so elect. It was not intended to limit rights. *See*, Hall, "The New Maryland Close Corporation Law", 27 Md.L.Rev. 341, 346 (1967). *Cf.* Shapiro, "The Statutory Close Corporation: A Critique and a Corporate Planning Alternative", 36 Md.L.Rev 289 (1976); *Adams* v. *Coates*, 331 Md. 1, 626 A.2d 36 (July 11, 1993); *Crawford* v. *Mindel*, 57 Md.App. 111, 469 A.2d 454 (1984).

U.S.C. 1367 (c)). Especially is that so since the Court had before it a proposed Third Amended and Supplemental Complaint with issues the Court has found should be brought in State Court.[11] Our position certainly does not warrant sanctions.[12]

VII. COUNT VII

Count VII requires little comment. Obviously its viability depended on the merits of the preceding Counts. Significantly, the Court stated at oral argument of the summary judgment motion that there no doubt was a conspiracy. The suggestion of sanctions with respect to Count VII is entirely beyond the pale.

VIII. COUNT VIII

We are puzzled that defendants even suggest that sanctions against plaintiff or his counsel are appropriate for Count VIII. As is made plain by our motion for attorney's fees (filed herewith), plaintiff is the prevailing party on this Count. Rather than repeat what is said in our motion for fees, we incorporate the substance thereof by reference.

With regard to our motion for disclosure of information, *see*, Affidavit of Robert E. Nagle (attached to our motion for fees). The motion was filed by us after consultation with Mr. Nagle, an expert in ERISA law. He

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[11] Alternatively, the Court might have considered referring the question to the Maryland Court of Appeals. However, this probably would have been less appropriate once the Court concluded the related Federal claims were to be dismissed.

[12] We note that virtually all of the evidence on Counts I through V also goes to Count VI, too.

advised undersigned counsel the motion was appropriate. *See*, p.14, n.21, *infra*.

IX. OTHER MATTERS

Defendants seek to have undersigned counsel sanctioned for objecting to the number of Interrogatories propounded by MMG. Undersigned counsel obtained consent to an extension of time to *respond* to the Interrogatories. Upon examining the Interrogatories in greater detail we discovered they far exceeded the permissible number. Accordingly, we served objections based on that *as well as any other objections we had to any particular Interrogatory*. In other words, we acted in good faith so as to state *all* our objections so that matters could be resolved between counsel. The matter was resolved between counsel.[13]

We are particularly annoyed by MMG's raising this matter since it does not do so with clean hands. Thus, despite the fact that this Court had denied defendants' motion for disqualification of undersigned counsel (paper no. 15 (5/13/92)), MMG served a subpoena on him to testify as to matters in this case. Even though this required a motion to quash (papers nos. 31 and 36 (12/7/92 and 12/14/92)), we did not seek sanctions, or, possibly, an order to show cause for contempt. Additionally, plaintiff 's counsel sought a settlement conference. The Order issued by Judge Kenkel (paper no. 57 (3/18/93)) directed that counsel attending have the authority to settle. It was apparent that counsel for MMG

[13] The contention that MMG could propound more than 30 Interrogatories because the other parties each could have propounded 30 is frivolous. Moreover, when the Individual Defendants sent Interrogatories, they substantially copied MMG's Interrogatories. We know not for what purpose since they already had answers under oath. Frankly, this is not the type of matter on which the Court should be asked to spend time. Furthermore, the length of time between the claimed infraction and request for sanctions should preclude the Court's consideration.

and counsel for the Individual Defendants had no such authority.[14] Prior to the conference, they asked us to make a demand. We did so. We never had a counteroffer either at the conference or otherwise. All we got, apart from some general agreement on non-monetary issues, was general statements to the effect that the monetary part was too much.

In short, defendants seek a "Who Struck John?" contest. We do not believe the Court wishes to be involved in this kind of unprofessional mud slinging.

X. SANCTIONS

As stated above, sanctions are totally inappropriate in this case. However, assuming, *arguendo*, that sanctions were warranted, plainly defendants are not entitled to their legal fees and expenses. As stated, *supra*, pp. 2-3, the least sanction required as a deterrent to conduct violative of Rule 11 is what should be imposed.

Moreover, the $176,000 defendants claim for fees and expenses clearly is unreasonable. There was no reason for two law firms and six attorneys to be involved in this case.[15] That certainly was made plain when Mr. Brault argued for *all*

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[14] Significantly, neither party sent senior counsel (Brault or Stein) to the conference.

[15] We suspect defendants will argue that there was the possibility of a conflict of interest could develop between MMG and the Individual Defendants. Apart from the fact that was unlikely, we assume the Individual Defendants had to waive any conflict of interest among themselves. Obviously, no conflict of interest developed since, as stated, *infra*, Mr. Brault argued for all defendants on all issues. Had a conflict of interest developed which could not be dealt with by appropriate waivers, that would have been the time to employ separate counsel.

of the defendants at the summary judgement hearing.[16] Depositions were attended by two (and at times three) attorneys for the defendants.[17] Four defense counsel attended discovery motions hearings, and four defense counsel attended the summary judgment hearing.

Undersigned counsel has examined his billings in this matter. Plaintiff 's counsel billed approximately 500 hours for all of litigation to this point (excluding responding to this motion and in the preparing our motion for fees with respect to Count VIII). In short, both the number of counsel involved and the time billed are excessive--a total of 1,276 hours involving six attorneys and at least four paralegals and support personnel. All of this (more than 2 1/2 times the time billed by plaintiff 's counsel), of course, defendants claim was required to deal with one single attorney for the plaintiff--an attorney who employed only secretarial support and whose competence to handle an employment case Stein, Sperling had questioned. *See*, p.1, n. 1, *supra*.[18]

Furthermore, while four of the eight Counts involved *only* the Individual Defendants, about two thirds of the hours

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[16] The Court overruled plaintiff 's counsel's objections to Mr. Brault arguing on behalf of MMG despite the fact that Brault supposedly represented only the Individual Defendants.

[17] Stein, Sperling shows billing for the time of four different attorneys (Stein, Bennett, Schwaber, and Bellew) and at least four different paralegals. Brault, Graham, Scott & Brault has filled for the time of two counsel (Brault and Mulquin).

[18] Defendants also state this litigation has consumed nearly two years. The case was filed February 24, 1992. Discovery was held in abeyance so far as defendants were concerned until mid-May when defendants' motions to disqualify plaintiff 's counsel were denied. The summary judgment hearing was a year after the case commenced in earnest.

claimed are for alleged work representing MMG. Additionally, part of the fees sought are for the conceded ERISA claim, for an abortive attempt to disqualify plaintiff 's counsel, and for discovery motions, which resulted, at least in part, in orders favorable to plaintiff.[19] *See*, papers nos. 48 and 51 (1/19/93 and 1/27/93).[20]

XI. CONCLUSION

For the foregoing reasons, defendants' motion should be denied.[21]

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19 We do not understand how defendants compute the number of discovery filings. Apparently, they include each deposition notice and each notice of service of discovery plus the served document itself in the calculation. Such computation is less than candid. Similarly, plaintiff took the deposition of each defendant and of one other witness. Defendants took several sessions of Dr. Hooper as well as four other oral depositions, plus depositions on written questions of two attorneys from whom voluminous documents were requested. In any event, we are not aware a party is to be punished for conducting discovery. Defendants sought no protective orders claiming discovery by plaintiff was unduly burdensome.

20 Paper no. 51 also grants plaintiff 's motion for leave to file the Second Amended Complaint.

21 The Court's Order (paper no. 77 (7/15/93)) denying Plaintiff 's Motion for Disclosure of Information *re* Pension Plan at n.2 could be read to find that plaintiff was seeking by the motion, or otherwise, to increase defendants' expenses. In our Statement of Remaining Issues we took exception to n.2. In a telephone conference on August 2, 1993, the Court stated it did not intend by its comment to make such a finding. As stated in our exception to the Court's comment (*see*, paper no. 78 (7/26/93)) such a finding would be unwarranted.

Respectfully submitted,

s/Allen H. Sachsel
ALLEN H. SACHSEL
Counsel for Plaintiff
10603 Judicial Drive
Fairfax, Virginia 22030
(703) 385-9400
Bar No. 09272

Certificate of Service

I certify that on August 17, 1993, I caused a copy of the foregoing Opposition to be mailed, first class, postage prepaid, to Jeffery M. Schwaber, Esquire, and David G. Mulquin, Esquire, at their respective addresses of record.

s/Allen H. Sachsel
ALLEN H. SACHSEL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

PLAINTIFF 'S MOTION FOR PARTIAL VACATION OF ORDER OF JUNE 30, 1993

For the reasons stated in the annexed memorandum, plaintiff respectfully moves that this Court vacate the part of its Order of June 30, 1993 granting summary judgment for defendants on Count VI of the Second Amended Complaint and with respect to Count VII thereof to the extent Count VII incorporates and relies on Count VI. Said Counts involve novel and/or complex questions of Maryland law which currently are pending in the Circuit Court for Montgomery County, Maryland. Resolution of the issues presented is most appropriate in the Maryland Courts.

Respectfully submitted,

/s/ Allen H. Sachsel
Allen H. Sachsel
Counsel for Plaintiff
10521 Judicial Drive
Suite 307
Fairfax, Virginia 22030
(703) 385-9400
Bar No. 09272

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

MEMORANDUM IN SUPPORT OF PLAINTIFF 'S
MOTION FOR PARTIAL
VACATION OF ORDER OF JUNE 30, 1993

28 U.S.C. 1367 (c) provides:

The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Subsection (a), which is referenced in the quoted subsection (c), authorizes the exercise of supplemental jurisdiction based, *inter alia*, on a claim or claims so related to causes of action arising under a Federal statute "that they form part of the same case or controversy under Article III of the United States Constitution."

As stated in our Opposition to Defendants' Motion for Rule 11 Sanctions at 8-9, while the precise issue presented has not been addressed by the Maryland Courts, the law of other jurisdictions supports the theory of liability advanced in support of Count VI. *See*, our Opposition to Defendants' Motion for Summary Judgment at 22-24. Neither defendants nor the Court has cited any contrary authority, Maryland or otherwise. Moreover, as stated in our Opposition to Defendants' Motion for Rule 11 Sanctions at 9 n.10, the Maryland Close Corporation statute "was not intended to limit rights."

At the time the Court determined that the related Federal claims, *i.e.*, Counts I and II, were to be dismissed, it would have been appropriate for the Court to decline to exercise jurisdiction with respect to Count VI. *See*, *Glanz* v. *Vernick*, 756 F.Supp.632, 639 (D.Mass. 1991); *Anspec Co., Inc.* v. *Johnson Controls, Inc.*, 788 F.Supp. 951, 959-960 (E.D.Mich. 1992); *Freer* v. Mayer, 796 F.Supp. 89, 94 (S.D.N.Y. 1992). We believe the law of Maryland is as we have contended; however, the Court is correct in its statement that the Maryland Courts have not directly dealt with the question.[1] The claim in Count VI "raises a novel...issue of State law" (28 U.S.C. 1367(c) (1)). Moreover, the Court had determined to dismiss "all claims over which it had original jurisdiction" (28 U.S.C. 1367(c)(3)). Furthermore, such

[1] Had the Court determined that Count VI stated a cause of action over which jurisdiction was to be retained, it might have been appropriate to refer the issue to the Maryland Court of Appeals. *See*, our Opposition to Defendants' Motion for Rule 11 Sanctions at 9 n.11.

dismissal would have been appropriate pursuant to 28 U.S.C. 1367(c)(4) because the Court had before it a Third Amended Complaint setting forth additional state causes of action. With respect to these new claims, the Court stated that "to the extent they are of merit-[they] can be, and should be, the subject of a separate state court action" (Mem. and Order of June 30, 1993 at 26). Thus, with the virtual certainty of a state court action between the same parties involved in Count VI, circumstances clearly were presented that justified, if not required, that the Court "decline to exercise supplemental jurisdiction" over a "claim [that] raises a novel...issue of State law", especially when the Court determined to dismiss "all claims over which it [had] original jurisdiction" (28 U.S.C. 1367(c)).

While the dismissal of Count VI could (and Count VII to the extent it relies on Count VI) would have been entirely proper previously, such dismissal by a vacation of the Order relating to those Counts is even more appropriate now. As stated in the proceeding motion, the filing of a state court action no longer is a matter of speculation, albeit speculation involving a near certainty. Such an action is now pending between the same parties involved in the Counts herein discussed, and such Counts have been filed in state court. (A copy of the First Amended Complaint in the Maryland Court is attached hereto.)[2] Accordingly, the Court should vacate the part of its Order relating to the state law issues presented in Counts VI and VII and permit them to be resolved by the Maryland Courts.[3] As stated in *Glanz* v. *Vernick*, *supra*, 756 F.Supp. at 639:

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[2] The state court complaint as originally filed contained only Counts I through IV.

[3] By limiting this motion to the matters discussed above, we do not concede the correctness of any of the Court's other rulings adverse to the plaintiff in this case. Moreover, we note that it would have been proper for the Court to decline to decide *all* of the state claims once it

> the state law claims at issue here present novel issues on which the state courts have not yet had much opportunity to comment. Rather than speculate on how the [state courts would decide] . . ., it would be preferable to permit the state courts to decide these issues in the first instance.

Though there has been extensive discovery in this case, that fact should not preclude dismissal. "The discovery conducted in this suit can be used in the state suit and will reduce extensively the need for discovery in the state action . . ." (*Freer* v. *Mayer*, *supra*, 796 F.Supp. at 94).

Respectfully submitted,

s/Allen H. Sachsel
ALLEN H. SACHSEL
Counsel for Plaintiff
10521 Judicial Drive
Suite 307
Fairfax, Virginia 22030
(703) 385-9400
Bar No. 09272

---

determined the related Federal claims were to be dismissed, since the state law claims then predominated. *See*, *Freer* v. *Mayer*, *supra*, 796 F.Supp. at 94. While we have not moved for vacation of the Court's Order as to the other state claims, we note such action would not be inappropriate even though those claims do not present the novelty of the claim stated in Count VI. Should the Court take that action, we would file those claims in plaintiff 's pending state court action.

CERTIFICATE OF SERVICE

I certify that on October 20, 1993, I caused a copy of the foregoing motion and memorandum to be mailed, postage prepaid, to Jeffery M. Schwaber, Esquire, and David G. Mulquin, Esquire, at their respective addresses of record.

s/Allen Sachsel
ALLEN H. SACHSEL

November 5, 1993

The Honorable Marvin J. Garbis
Chambers- Room 740
United States District Court
for the District of Maryland
101 W. Lombard Street
Baltimore, Maryland

Re: *Hooper v. MMG*, et al.,

Civil Action No. MJG 92-529

Dear Judge Garbis:

I write on behalf of the Defendants in the above matter.

On August 2, 1993, a conference call was held with Your Honor and all counsel. At that time, Your Honor opted to withhold entry of a final order pending a ruling on the Motion for Sanctions which remains outstanding as of this writing.

At this time, Defendants request that a final order be entered pursuant to your Memorandum and Opinion of June 30, 1993. The reason for this request is that Plaintiff has amended his state court action against the Individual Defendants to incorporate certain causes of action (Counts V and VI of the attached First Amended Complaint filed in the Circuit Court for Montgomery County) which were previously addressed and dismissed by Your Honor in this federal litigation. The lack of a final order in the instant case has prompted Plaintiff to attempt to relitigate these same issues in the state court.

We thank you for your consideration of this matter.

Very truly yours,

/s/ Albert D. Brault
Albert D. Brault

ADB:ecs

cc: Allen H. Sachsel, Esquire
Jeffrey M. Schwaber, Esquire

November 8, 1993

The Honorable Marvin J. Garbis
United States District Court
for the District of Maryland
101 West Lombard Street-Room 740
Baltimore, Maryland 21201

Re: *Hooper* v. *Montgomery Medical Group, P.A., et al.*,

C.A. No. 92-529-MJG

Dear Judge Garbis:

This is with reference to the letter of November 5, 1993 from Albert D. Brault.

Defendants should have responded to our pending motion for partial vacation of the Order of June 30, 1993. Facts referenced by Mr. Brault were brought to the Court's attention in our motion. (We also note that Mr. Brault is only partially correct when he states that the Court withheld entry of final judgment "pending a ruling on the Motion for Sanctions." The Court withheld such entry so it could rule on that motion *and* plaintiff 's motion for fees with respect to Count VIII.) In any event, our pending motion to partially vacate the June 30, 1993 Order should be considered.

Respectfully,

s/Allen H. Sachsel
ALLEN H. SACHSEL
Counsel for Plaintiff

cc: Albert D. Brault, Esquire
Jeffery M. Schwaber, Esquire
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

REPLY TO OPPOSITION TO MOTION FOR PARTIAL VACATION OF ORDER OF JUNE 30, 1993

1. Defendants argue that the law of Maryland is settled on the question of the fiduciary duties owed by shareholders/ stockholders/directors of a closely held corporation that has not elected statutory close corporation status pursuant to Md. Code Sec.4-01, *et seq*. They simply are wrong.

The Maryland Courts have not considered explicitly whether the fiduciary duties owed in such circumstances, as held to exist by other jurisdictions, apply in Maryland. There simply are no Maryland decisions that directly address the issue. *But cf., Crawford v. Mindel*, 57 Md.App. 111, 120-121, 469 A.2d 454, 459 (1984).[1]

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[1] Cases relied on by defendants (Mem. at 3-4) do not support their position. None considers duties owed within a closely held corporation. Thus, *Goodman v. Poland*, 395 F.Supp. 660 (Md. 1975), concerns matters under Section 10(b) of the SEC Act and obviously does not involve a closely held corporation. *Llewelyn v. Queen City Dairy*, 187 Md. 49, 48 A. 2d. 322 (1946), deals with a "commercial corporation" (187 Md. at 59, 48 A.2d 327), which plainly was not a closely held

The Maryland Close Corporation law was intended *solely* to provide simplified operating procedures for qualifying corporations that specifically elect *statutory* close corporation status. Title 4 of the Maryland Code was not intended to limit or diminish any other obligations, duties, or status. As stated by William G. Hall, Jr., a Member of the Commission on Revision of the Corporate Laws of Maryland, in "The New Maryland Close Corporation Law", 27 Md. L. Rev. 341, 346 (1967) (emphasis added):

> In summary, the purpose of a statutory definition of a close corporation is not to set forth an accurate general definition of the term, but rather to differentiate between corporations for which the particular benefits being provided in the statute are appropriate and corporations for which those benefits are not appropriate.

And see, Shapiro, "The Statutory Close Corporation: A Critique and a Corporate Planning Alternative", 36 Md. L. Rev. 289 (1976).

In *Crawford v. Mindel, supra*, the Court of Special Appeals considered the propriety of the action of one of three stockholders in, *inter alia*, conducting a board of directors' meeting and acting in his own interests with regard to the corporation, and contrary to the interests of the other two

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corporation, and the question, like that in *Goodman, supra*, relates to fiduciary duties regarding stock purchases. Similarly, *Wheeler* v. *Wheeler*, 187 Md. 185, 49 A.2d 449 (1946), involves a suit for injury to the corporation. The question of fiduciary duties in a closely held corporation was not considered in this half century old case. *Merchants Mortgage Co. v. Lubow*, 275 Md. 208, 339 A.2d 664 (1975), is an action by the corporation against its agent, employee, and officer. It clearly does not involve a closely held corporation, and the issue presented is irrelevant. *Crawford v. Mindel, supra*, supports plaintiff 's position and is discussed, *infra*. The allegations of Count VI do not relate merely to directors' obligations *vis a vis* a shareholder's stock. *See, infra*.

shareholders, including terminations of their employments. Though there is no indication that the corporation was a statutory close corporation, the Court of Special Appeals found fiduciary duties owed both to the corporation and the other two shareholders. Thus, it stated, with regard to the conduct of the offending shareholder, "Based on the *fiduciary duty owed* to the corporation and *the individual appellees*, his conduct may be categorized as a classic example of constructive fraud, which usually arises from a breach of duty where a relationship of trust and confidence exists (57 Md. App. at 120-121, 469 A.2d at 459 (emphases added)).

Count VI seeks to impose liability and fiduciary duties, *not* on directors with relation to other shareholders' stock. The duty is imposed on shareholders/officers/directors in a closely held corporation as regards their general obligations to one another. As stated in our Opposition to Defendants' Motion for Summary Judgment at 22-25, the general law is that members of a closely held corporation "'owe one another substantially the same fiduciary duty that partners owe to one another...[and] this strict good faith standard [measures]...their duty of loyalty to the other stockholders and to the corporation'" (*Id.* at 23). The Maryland Courts have not directly addressed the issue of whether the adoption of the Close Corporation Law in any way changes those duties in a closely held corporation that has nor opted for *statutory* close corporation status. Furthermore, defendants have cited no cases contrary to our position from any jurisdiction.

While we believe the Close Corporation Law does not diminish duties owed between and among members of a closely held corporation that has not elected to operate as a statutory close corporation, the question is one that most appropriately should be determined by the state courts. What this Court has done is to determine for the Maryland Courts that the Close Corporation Law has an effect not intended. *See*, Hall, *supra; Crawford v. Mindel, supra.* The question of

the intent of the state legislature should be left to the Maryland Courts.

2. Unquestionably, the determination to exercise pendent (now supplemental) jurisdiction (28 U.S.C. 1367) is a matter of discretion. The point, however, is that under the standards for such exercise pursuant to 28 U.S.C. 1367, which substantially codifies case law in this respect, the Court's exercise of discretion should have resulted in not ruling on this issue once it determined the related Federal claims were to be dismissed.[2]

Defendants' suggestion that a Federal court would be "powerless to resolve pendent state claims whenever it simultaneously dismisses federal claims which form the basis of the court's jurisdiction" (Mem. at 5) is specious. We make no such argument. All we argue is that a Federal court, having determined to dismiss related Federal claims, should not determine novel or unsettled issues of state law. Where such novel and unsettled state law issues are present, proper exercise of a Federal court's discretion requires that the Federal court not decide such issues. Especially is that so when a state court action is filed, or is about to be filed, and the novel or unclear state law issues easily can be litigated

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[2] Cases defendants cite (Mem. at 2) do not support their position. *Graham v. City of Charolette*, 827 F. 2d. 945 (4th Cir. 1987), *vacated and remanded*, 490 U.S. 386(1989), affirms the discretion exercised in dismissing state claims. *Sun Dun, Inc. of Washington v. Coca Cola Co.*, 740 F.Supp. 381 (D.Md. 1990), retains jurisdiction based, in part, on the fact that dismissal might create a Statute of Limitations problem (740 F.Supp. at 394), a factor no longer relevant by virtue of 28 U.S.C. 1367 (d). *Dublin Scarboro Imp. Ass'n v. Hartford County, Maryland*, 678 F.Supp. 129 (D. Md. 1988), actually *supports* dismissal of the state claims in circumstances here presented. *Graf v. Elgin, Joilet and Eastern Ry. Co.*, 790 F.2d 1341 (7th Cir. 1986), is irrelevant. It involves unusual and complex circumstances totally absent in this case.

separately from the dismissed and related Federal claims.[3]

3. Contrary to defendants' contention, allowing this matter to be litigated in state court will not "cause a substantial duplication of. . . effort" (Mem. at 2). Discovery done in this Court "can be used in the state suit and will reduce extensively the need for discovery in the state action..." (*Freer v. Mayer*, 796 F. Supp. 89, 94 (S.D.N.Y. 1992).

4. Defendants' request for sanctions and their other conduct in responding to our motion is inappropriate. As the Court is aware, three days prior to filing their Opposition, defendants' counsel wrote to the Court apparently seeking to short circuit the motions process. That letter of November 5, 1993, was responded to by us. Thereafter, on November 8, 1993, defendants' counsel wrote again, enclosing a copy of our First Amended Complaint filed in the Montgomery County Circuit Court and implying that we had sought to keep the facts surrounding that filing from this Court.[4] That

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[3] As stated in our initial memorandum, the Court appropriately, in the circumstances, particularly with one novel/complex, state claim presented, could refuse to decide *all* state claims.

[4] We note that others papers apparently have been prepared and signed by David Mulquin with Albert D. Brault's named signed by Mulquin. The referenced letters were signed by Albert D. Brault. Perhaps Mr. Mulquin refused to sign the letters, or perhaps Mr. Brault erroneously believes a letter to the Court from him personally carries some special weight or significance.

Defendants have been less than fully candid, both in the above-referenced letters to this Court (*see, supra* , and our letter of November 8, 1993) and in their filing in the Montgomery County Circuit Court. In the Circuit Court they requested a stay, indicating entry of judgment is imminent. They make no mention of the instant motion. (A copy of defendants' Circuit Court filing (attachments omitted) is annexed hereto.) We intend not to oppose the requested stay as to the Counts in question to be effective for a reasonable time sufficient to allow this Court to rule.

obviously is not so since we informed the Court in our memorandum in support of the motion that "[s]uch an action is now pending between the same parties involved in the Counts herein discussed, and such Counts have been filed in state court" (Pl. Mem. at 3). Furthermore, a copy of the First Amended Complaint in the state court was attached to our memorandum.

In requesting sanctions for our motion, defendants seek to throw-up a smoke screen. Not only are sanctions entirely unwarranted, but, in addition, are improperly requested. Such relief should be sought, if at all, by motion. *See*, Local Rule 105-8. Local Rule 105-8-a also provides: The Court expects that motions for sanctions will not filed as a matter of course. The Court will consider in appropriate cases imposing sanctions upon parties who file unjustified sanctions motions. We believe defendants are acting inappropriately and that they improperly seek to use FRCP Rule 11 as an intimidation tactic. They seek to avoid possible sanctions for such abuse by not formally filing a motion, but, rather by inappropriately making suggestions in their Opposition.

Defendants imply that plaintiff's motion is so frivolous that the Court should impose sanctions *sua sponte* (Mem. at 1, 5-6), and then conclude by "request[ing] a hearing on the Plaintiff's Motion For Partial Vacation of Order of June 30, 1993 and opposition thereto" (Mem. at 7). We find it ironic that defendants request a hearing on a motion they claim is so frivolous as to be sanctionable *sua sponte*.[5]

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[5] With regard to Rule 11 sanctions, we direct the Court's attention to the Supreme Court's proposed revisions of Rule 11 at 146 FRD 419-424 (1993). Said proposed amendments are pending Congressional action.

5. For the foregoing reasons, and for the reasons stated in our initial memorandum, plaintiff's motion should be granted.

Respectfully submitted,

/s/ Allen H. Sachsel
ALLEN H. SACHSEL
Counsel for Plaintiff
10521 Judicial Drive
Suite 307
Fairfax, Virginia 22030
(703) 385-9400
Bar No. 09272

CERTIFICATE OF SERVICE

I certify that on November 16, 1993, I caused a copy of the foregoing Reply to be mailed, first class, postage prepaid, to David G. Mulquin, Esquire, and Jeffrey M. Schwaber, Esquire, at their respective addresses of record.

/s/ Allen H. Sachsel
ALLEN H. SACHSEL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

OPPOSITION TO DEFENDANTS' REQUEST FOR FURTHER SANCTIONS

A. Statement of Facts

On June 30. 1993,[1] this Court entered an Order granting summary judgment to the defendants on seven of eight Counts of the Second Amended Complaint ("the Complaint").[2] Subsequently, Count VIII was mooted by MMG's payment to Dr. Hooper of the amount he claimed to be due under ERISA. MMG also paid, or offered to pay, other beneficiaries of the pension plan at issue the amounts due pursuant to the method of calculation advanced in Count VIII by Dr. Hooper. MMG had refused to make these payments until after it was served with the suit. *See*, our Motion for Attorneys' Fees.

The June 30 Order denied plaintiff 's motion for leave to file a Third Amended Complaint adding Counts involving the sale in April of MMG's assets. The Court concluded, as

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[1] All dates hereafter are 1993.

[2] Counts I and II were filed against Montgomery Medical Group, P.A. ("MMG"), and defendants Withrow, Perrino, Karesh, Dolinsky, Juarbe, and Baier ("Individual Defendants"). Counts III and VIII were against MMG, only. The remaining Counts -- Counts IV, V, VI, and VII named the Individual Defendants, only.

agreed by all counsel at argument of the summary judgment motion, that the new Counts sought to be added were unrelated to Count VIII and that it would not be appropriate for the Court to exercise jurisdiction over these state law claims if the Court granted summary judgment to defendants on Counts I through VII.[3]

Count VI of the Complaint alleged a claim for breach of fiduciary duty by the Individual Defendants. The claim was based on the fact that plaintiff and the Individual Defendants owed each other fiduciary duties as shareholder/officers /directors in a closely held professional corporation engaged in the practice of medicine, and that the Individual Defendants had breached such fiduciary duties owed by them to Dr. Hooper. In support of his argument plaintiff cited cases from other jurisdictions finding in similar circumstances the existence of such duties. Neither side cited any Maryland cases addressing the precise issue raised. Defendants relied solely on law applicable to corporations generally (primarily dealing with directors' obligations to stockholders *vis a vis* stock) and on the fact that MMG had not elected *statutory* close corporation status under the Maryland Close Corporation Law.[4] However, the Maryland Courts have not held that it is necessary for a closely held corporation to have elected statutory close corporation status for such fiduciary duties to arise, and at least one writer, William G. Hall, a member of the relevant legislative committee, has written that the Close Corporation Law was not intended to provide an accurate general definition of a close corporation, but was intended merely to define those corporations which can elect to operate in the simplified fashion provided in the statute.

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[3] Of Counts I through VII, only Counts I and II presented Federal claims.

[4] Authorities mentioned herein, unless completely cited, are fully cited in our Reply to Defendants' opposition to our Motion for Partial Vacation of Order of June 30, 1993.

Moreover, at least one case from the Maryland Court of Special Appeals (*Crawford* v. *Mindel*) intimates that fiduciary duties of the type claimed in Count VI can be found irrespective of statutory close corporation status.

At the time of the summary judgment hearing, there was no discussion of the possibility of this Court not entertaining jurisdiction with respect to Count VI because of the absence of clear Maryland law on the issue presented. The question was not raised by any party, or by the Court.[5]

On August 2, counsel for the parties had a telephone conference with the Court. At that time there was pending Defendants' Motion for Attorneys Fees -- sanctions sought pursuant to FRCP Rule 11. The Court had ordered a response from plaintiff by August 17, and plaintiff indicated that he wished to file a motion for attorney's fees for Count VIII -- the ERISA Count with respect to which plaintiff had prevailed by virtue of MMG's concession that it would recompute as to plaintiff and the other pension plan participants. In the conference the Court indicated that it would enter judgment and would consider defendants' sanctions motion and plaintiff 's fees motion separately, treating them as post judgment motions. Counsel for plaintiff suggested it might make more sense for the Court to enter a single order since both the response to the sanctions motion and the ruling on the fees motion were to be accomplished by August 17, thus making all such filings due by September 17-- any reply filed by defendants for the sanctions motion due August 31, defendants' opposition to plaintiff 's fees motion due September 3, and any reply by plaintiff due September 17.The Court stated that there was some concern about closing cases and then indicated that this delay into the next

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[5] In the initial telephone conference in this case, when only Counts I, II, and III were before the Court, Albert D. Brault, counsel for the Individual Defendants, took the position that the Court should not decide Count III if Counts I and II were dismissed.

month would not create a problem. Accordingly, the Court adopted the suggestion of plaintiff 's counsel.

At the time of the conference, plaintiff had not filed in state court the additional Counts pled in his proposed Third Amended Complaint, which the Court had declined to allow plaintiff to file for reasons stated above. The state court action was filed on September 15.

After the state court action was filed against the same defendants as in Count VI in the Complaint in this Court, counsel concluded that if judgment were entered promptly, it might be appropriate to move to alter or amend the judgment based on the fact that a state court action between the same parties in fact was pending, and based on the fact that the Court had ruled in Count VI on an issue of first impression in Maryland. When judgment was not entered by mid-October, a decision was made to seek partial vacation of the Court's June 30 Order for the same reasons. A decision also was made to file the substance of Count VI of the Complaint in the pending state court action. That decision was based on the knowledge that the state court action would have time frames set, and plaintiff wished to avoid delay in asserting all his claims. It was counsel's judgment, made in consultation with other competent attorneys, that the Court might reconsider its decision to exercise jurisdiction on a question of unsettled state law, especially since there was a state case now *actually* pending between the same parties. The motion filed had appended to it the First Amended Compliant filed in the Montgomery County Circuit Court.

On November 5, three days (one business day) before the response to plaintiff 's motion was due, Albert D. Brault, counsel for the Individual Defendants, wrote to the Court asking that judgment be entered because plaintiff was seeking to relitigate in state court a matter that had been decided by this Court, albeit without entry of a final judgment. Plaintiff 's

counsel responded by letter of November 8 stating that the request as made was inappropriate and the defendants should respond to plaintiff 's pending motion.

Defendants served their response to plaintiff 's motion on November 8. In that response they suggested that plaintiff 's counsel should be sanctioned for seeking relief from this Court with respect to part of the Court's Order of June 30. They did not file a motion for sanctions.

On November 8, the Individual Defendants also filed in the Montgomery County Circuit Court a motion to, *inter alia*, stay proceedings with respect to two Counts in the state court First Amended Complaint. Those Counts are substantively identical to Counts VI and VII of the Complaint in this Court.

Plaintiff 's Reply to Defendants' Opposition to the Motion for Partial Vacation of this Court's Order of June 30 was filed on November 16, six days prior to its due date. On November 17, plaintiff 's counsel received this Court's Order of November 15 and a judgment of the same date, to which this filing was directed, which was amended two days later to correct a typographical error. The Court denied plaintiff 's motion, considering only plaintiff 's motion and memorandum and defendants' opposition (including the December 5 letter from Brault, which the Court, without notice, treated as a motion). The Court did not await plaintiff 's Reply which, under the Rules of this Court, he was entitled as a matter of right to file and to have considered.[6]

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[6] In the Reply we indicated we would not oppose the stay sought in the state court by defendants for a reasonable time sufficient to allow this Court to rule on the motion for partial vacation of the June 30 Order. As stated above, the Reply was filed prior to receipt of this Court's November 15 Order.

On November 17, plaintiff elected voluntarily to dismiss the Counts in state court which were substantially identical to Counts VI and VII in this Court, on which this Court had ruled, and with respect to which this Court now had entered judgment. At a status conference in the state court on November 19, as plaintiff 's counsel had anticipated, the Montgomery County Circuit Court set deadlines for the case. *See*, Exh. 1 (attached hereto).

B. Argument

1. Rule 54(b) of the Federal Rules of Civil Procedure provides, in pertinent part, that until final judgment is entered on all claims, absent a specific determination that judgment should be entered on some, but not all claims, "any order or other form of decision, however designated, which adjudicated fewer than all claims or the rights and liabilities of fewer than all of the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." At the time plaintiff filed his motion for partial vacation of the June 30 Order there plainly was no judgment, and the Memorandum and Order plainly were "subject to revision."

2. Plaintiff had the absolute rights to (a) move for reconsideration of the June 30 Order (Local Rule 105-10); (b) to move, as he did, based on new circumstances, for vacation or modification of a non-final order; (c) to move after entry of judgment for alteration or amendment of the judgment pursuant to FRCP Rule 59(e).

3. Plaintiff 's motion is not "beyond frivolous and well into the area of utterly outrageous" (Order of November 15 at 2). As stated above, both the Federal Rules of Civil Procedure and the Rules of this Court contemplate post

decisional motions. Not only was the filing authorized, it presented legitimate arguments in support of the relief sought. Furthermore, the counterarguments advanced by defendants were answered in proper legal form with reasonable legal arguments in a Reply that was not considered by the Court because the Court ruled one day prior to the time the Reply was filed, and one week prior to the time for the filing of the Reply was to expire. (The substance of our Reply filed November 16 is incorporated herein by reference.)

Plaintiff 's motion is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and...is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless[ly] increase...the cost of litigation" (FRCP Rule 11). Moreover, as stated, *supra*, reasonable inquiry, including, but not limited to, consultation with other counsel was done prior to filing the motion. There was complete compliance with Rule 11. Indeed, the requirements of Rule 11 were more than fully satisfied.

4. The Court suggests that plaintiff 's (or his counsel's) purpose in filing the motion, or in seeking to obtain the relief requested, is to "cost defendants even more in legal fees by litigating the same claim in another court" (Order of November 15 at 2). There is no basis for the Court's statement.[7]

Everything that has been done by plaintiff or his counsel in this case has been to advance legitimately plaintiff 's

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[7] In denying plaintiff access to information with regard to MMG's complaint as to other pension plan participants, the Court suggested in a footnote that plaintiff was seeking the information to cost defendants more money in dealing with him. Plaintiff 's counsel excepted to this statement, and in the telephone conference of August 2, the Court stated it did not intend any such finding.

rights. Furthermore, everything done has cost plaintiff money. To even suggest that plaintiff has spent his own resources simply to cost expenditures either divided among six individual defendants or paid by a corporation in which plaintiff owns 15% of the stock makes no sense. Plaintiff is justifiably outraged at the conduct of defendants. However, neither he nor his counsel is irrational.

The fact is that plaintiff, before any litigation was instituted, offered in writing to end all disputes relative to his employment on very reasonable terms--$150,000 payable over five years. *See*, Exhibit 2 (attached hereto). Defendants would not respond and refused to consider any settlement in which they did not receive complete releases from Dr. Hooper while giving Dr. Hooper no release. Thereafter, and before litigation, plaintiff 's counsel offered to settle all matters between the parties for $125,000, with payments to begin after the large bank loan (referenced in Counts IV and V of the Complaint) for tax arrearages was paid. Again, defendants would not negotiate and would not consider general mutual releases.

Rather than settle this matter on reasonable terms, or even attempt in good faith to respond to Dr. Hooper's offer, defendants chose to fight tooth and nail, and as this Court is aware, have represented that they have spent in excess of $176,000 in litigation expenses. While defendants have brought to the Court materials dealing with possible settlements, we refrained from so doing. However, given the allegations of defendants and the Court concerning the motivations of Dr. Hooper and his counsel, we believe it now imperative these materials be considered with respect to the matter of sanctions as to Plaintiff 's Motion for Partial Vacation of Order of June 30, 1993, and as to the matter of sanctions, generally. *Cf.* FRCP, Rule 68.

5. The Court states (November 15 Order at 2 (emphases added)):

> Now, the Plaintiff seeks to have this Court-after the matter *has at great expense* been presented and decided against him-exercise discretion to decline jurisdiction over the subject claim. Plaintiff now wishes to be able to present his breach of fiduciary duty claim all over again in state court with a new judge and, presumably a new round of *expensive proceedings*.

There simply were no expensive proceedings with respect to the Count VI breach of fiduciary duty claim. At the time Magistrate Judge Kenkel allowed the filing of the Second Amended Complaint -- the document in which the breach of fiduciary claim first was presented--his Order allowed plaintiff no discovery. This was so because at the hearing on that motion plaintiff 's counsel stated he did not believe he needed any discovery with respect to the new Counts--Counts IV, V, VI, VII, and VIII. Though Judge Kenkel left it open for plaintiff to seek leave to conduct some discovery with respect to the added Counts, plaintiff never sought such leave and initiated no further discovery on the new Counts prior to the summary judgment hearing.[8] The discovery plaintiff had was deemed sufficient for Count VI, and a new round of expensive (expensive for plaintiff) proceedings was not contemplated. Based on the Court's Order of June 30, the issue was principally a matter of law he believed it most appropriate the Maryland Courts decide. Thus, this Court decided that no fiduciary duties existed because MMG had not elected statutory close corporation status. To have a Maryland Court determine that legal issue

[8] As set forth, *supra*, plaintiff did seek some discovery, which the Court did not allow, as to Count VIII after the summary judgment hearing.

simply would not involve "a new round of expensive proceedings."[9]

6. The Court denied plaintiff 's Motion based on the motion, the supporting memorandum, defendants' opposition,

[9] As set forth in n. 7, supra, this Court previously alluded to plaintiff seeking to cost defendants as much money as possible in dealing with him and then stated it was making no such finding. Now the Court alludes to "allow[ing] the Plaintiff to cost the Defendants even more in legal fees" (Order of November 15 at 2). As stated, *supra*, the record contains nothing to support such finding. Furthermore, the Court has before it not only the question of sanctions on the motion to partially vacate the June 30 Order, but, also, defendants' motion for sanctions with regard to the case as a whole. Plaintiff 's time to notice an appeal from the judgment expires three days (originally one day) after final submissions on sanctions with regard to the motion to partially vacate the June 30 Order are due. It seems unlikely the Court will have decided defendants' other motion for sanctions before the time to appeal expires. Since an appeal obviously would "cost the Defendants even more in legal fees", the Court's action and comments could be construed as having a chilling effect on plaintiff 's appeal rights, and on his counsel.

We also note that prior to receipt of the Court's November 15 Order, we had indicated we would consent to a reasonable stay in the Montgomery County Circuit Court. Our filing the First Amended Complaint in state court should not be used as a basis for imposing Rule 11 sanctions in this Court. Such papers were not filed in this Court. Moreover, this Court was not used in alleged "forum shopping." Plaintiff brought good faith Federal claims to this Court. After the Court ruled on two of those claims, he suggested that *one* pendent claim on which the Court ruled might more appropriately be decided by the Maryland courts because of the novelty of the claim. We brought the claim in state court while our motion for partial vacation was pending because of perceived time constraints. Furthermore, as stated above, prior to receipt of this court's Order, we indicated we would accept a stay of the state court proceedings -- a stay to which we would have consented orally if counsel had asked us. Once the Court's ruling became final, we immediately dismissed that part of the state court action. We had sought no discovery in state court, and, as stated above, fully intended to agree to a stay on the Counts in question to allow this Court to dispose of the motion for partial vacation of the June 30 Order.

and defendants' counsel's December 5 letter, which provided no information not stated in our motion, and which the Court elected, without notice, to treat as a motion. It did not await plaintiff 's Reply, a pleading plaintiff was entitled to file as a matter of right pursuant to Local Rule 105-2-a. While the Court, of course, could have denied the motion without awaiting a response,[10] once a response was filed and considered by the Court, to decide the motion without awaiting plaintiff 's Reply (or the expiration of the time to file a Reply) was, we respectfully submit, a denial of Procedural Due Process, and that is particularly so since plaintiff filed his Reply six days prior to its due date in order to expedite consideration of his motion.

7. While we disagree with the Court's rulings on the merits of this case, what perturbs us more is the Court's imputations of improper motives to both plaintiff and his counsel. Counsel, of course, is ethically precluded from asserting his personal belief in the merits of his client's cause. He is not, particularly under the circumstances, precluded from asserting his good faith professional judgment that every document filed in this case fully complied with FRCP Rule 11. He makes that assertion.

Counsel has done no more than vigorously pursue his client's case, including the filing of the motion in question. He has a professional obligation to do so, and would be subject to disciplinary action were he to do less. In the judgment of counsel (a judgment reached after consultation with other attorneys) the motion in question presented good faith

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[10] Had the Court so acted during the 17 days the motion was pending before an Opposition was served, there would be no question of defendants' expenses in responding to the motion since there would have had none. Similarly, had defendants requested entry of judgment immediately, and had the Court acted on the request promptly, there would have been no expense in responding to the motion.

argument. *And see*, n. 9, *supra*. As pointed out in our Reply, while contending the motion is frivolous and sanctionable, defendants' counsel asked for a hearing on that motion.[11]

Equally unsettling is the Court's characterization of plaintiff 's ERISA claim. Thus, the Court states (November 15 Order at 3 (emphases added)):

> It is true that the Plaintiff would consider himself to have prevailed as to Count VIII because he received full payment of the amount which he claimed was due with respect to that Count. *** The fact that there was included in this law suit *a relatively minor claim* which the Defendants did not consider worth the cost of litigation...

Plaintiff alleged a violation of a Federal statute. He had attempted to procure compliance without litigation. Only after plaintiff was unable to obtain compliance without litigation was the claim brought. Then, and only then, did defendant MMG choose to comply with ERISA and to provide proper benefits to plaintiff and to other pension plan participants. It is disturbing that a Federal Court refers to enforcement of ERISA rights affecting a number of people as "a relatively minor claim." Payments totaling into five figures wrongfully appropriated from a number of pension plan participants is not "minor."

It also seems the Court evaluates the conduct of defendants' counsel and plaintiff 's counsel by different standards. Thus, while apparently having concluded that plaintiff 's counsel should be sanctioned for the motion for partial vacation (without a motion for sanctions by

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[11] Defendants, as stated, *supra*, did not file a motion for sanctions with respect to the Motion for Partial Vacation of Order of June 30, 1993.

defendants), it made no such suggestion with respect to defendants' motion at the outset of this case to disqualify plaintiff 's counsel even through the Court's Order denying the motion indicates the motion was frivolous, or close to frivolous. Similarly, no action has been suggested by the Court against defendants' counsel for issuing a subpoena (quashed on plaintiff 's motion) to plaintiff 's counsel for a deposition long after the just mentioned disqualification had been denied. Likewise, the Court took no action against defendants' counsel for filing oppositions to plaintiff 's motion for a four day extension of time to respond to defendants' summary judgment motion. Not only were those oppositions frivolous, but each counsel for defendants filed a separate opposition at different times, causing two replies to be filed. The filing of separate oppositions, contrary to defendants' practice throughout this case (apart from the answers) of filing joint documents, clearly was intended to increase expenses and to harass.

C. Conclusion

For the foregoing reasons, sanctions should not be not imposed on plaintiff or his counsel.[12]

Respectfully submitted,

s/ Allen H. Sachsel
Allen H. Sachsel
Counsel for Plaintiff
10521 Judicial Drive
Suite 307
Fairfax, Virginia 22030
(703) 385-9400
Bar No. 09272

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12 As to the matter of sanctions, generally, *see*, our Opposition to Defendants' Motion for Rule 11 Sanctions filed August 17.

Certificate of Service

I certify that on November 29, 1993, I caused a copy of the foregoing Opposition to be mailed, first class, postage prepaid, to David G. Mulquin, Esquire, and Jeffery M. Schwaber, Esquire, at their respective addresses of record.

s/Allen H. Sachsel
Allen H. Sachsel

17214 Dr. Bird Road
Sandy Spring, Maryland 20860
July 23, 1991

Board of Directors
Montgomery Medical Group
15225 Shady Grove Road, Suite 105
Rockville, Maryland 20850

Dear Doctors:

It seems we are going round and round concerning terminating a relationship we both wish to end. The only thing being accomplished is running up legal bills on both sides. None of us is the beneficiary.

Simply stated, I am writing [*sic willing*] to end my employment with, and stock ownership at MMG on the following terms:

1. $150,000.00 payable $25,000 at closing with the balance to be paid over five years at 7% interest on the unpaid balance.

2. I will give a non-compete for a period of one year from the date I went on leave from MMG, such non-compete to cover a one-mile radius from the Rockville office.

3. MMG will pay any malpractice tail it wishes to procure to protect the corporation. I'll worry about any insurance necessary to protect myself.

4. I will release the corporation and all its stockholders, officers, and directors from any and all claims,

and the corporation, the stockholders, officers and directors likewise will release me.

5. Except for paragraph 6.5 (referenced as 4c in Bennett's letter without reference to 6.5 as "Contingent Liability") and as indicated above, the other items listed on page 4, paragraph 4 of Bennett's letter of June 28, 1991, to Elling would be included in the agreement -- 4a, b, d, f (as modified above), 13, and 15 would be included. (A copy of the referenced letter is attached.)

I believe the above is a reasonable offer since the accountant in the attached computation has valued my book value share of the corporation at $181,000.00. Further, I currently have no legal obligation not to compete. Let's get this done in a fair manner without rancor and get on with more productive endeavors.

Finally, I request the meeting noticed for July 31 be postponed as I have unalterable plans to be out of town. I am available between the 7th and 15th of August. However, if that's not good for all of you, I suggest we have enough communication that we can meet at a time all of us can be there.

Sincerely,
/s/ James L. Hooper
James L. Hooper, M.D.

P.S. I view the question of the Germantown building partnership as a separate matter. It should not delay an agreement between *all* of us because of a separate relationship between *some* of us.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES L. HOOPER, M.D.,
Plaintiff,

v.

MONTGOMERY MEDICAL GROUP, P.A., *et al.*,
Defendants.

Civil Action No. 92-529-MJG

PLAINTIFF 'S STATEMENT OF POSITION

On November 15, 1993[1], this Court issued an Order which states, *inter alia*:

2. By November 30, 1993:

a. Plaintiff 's Counsel, Allen H. Sachsel, Esquire, shall respond to Defendants' Motion seeking further sanctions for his signing Plaintiff 's Motion for Partial Vacation of Order of June 30, 1993 and the memoranda submitted therewith.

b. Defendants shall submit a statement, including an affidavit with supporting evidence, of costs incurred in responding to said motion.

---

1 All dates hereafter are 1993.

3. By December 14, 1993 Mr. Sachsel and Defendants may each file a response to the November 30, 1993 filings required herein.

Plaintiff 's counsel has compiled with that Order by filing on November 30 his response, as ordered by the Court. Defendants have not made the filing specifically "required" by the November 15 Order--filing by November 30, "a statement, including an affidavit with supporting evidence of costs incurred in responding to said motion"--the motion for partial vacation of the June 30, 1993 Order.

On November 29, this Court issued Orders which, *inter alia*, grant defendants' motion for Rule 11 sanctions and assess $5,000 against plaintiff 's counsel. One day later, November 30, defendants served a Bill of Costs.[2] Paragraph 4 of the Bill of Costs states, "A supplement to Defendants' Motion for Attorneys' Fees and Sanctions Pursuant to Rule 11 of the Federal Rules of Civil Procedure will follow, by separate pleading, including attorneys' fees incurred by Defendants since the date of Defendants' submission of the Motion for Sanctions." Since the Court ruled on the Motion for Sanctions and awarded $5,000, any such supplemental submission now is irrelevant.

---

[2] The Bill of Costs states (para. 2) that the costs for responding to the motion for partial vacation of the June 30, 1993 Order are included and have not been broken down separately. It states that "[i]f the Court requires that costs for that particular defense be broken out separately, an amended Bill of Costs can be filed." This Court's Order of November 15 ordered defendants to do just that. Defendants have not complied with that Order.

The Bill of Costs also includes items clearly not included as allowable pursuant to 28 U.S.C. 1920, and excessive and improperly documented, or undocumented, charges. This matter is dealt with by us in detail in a separate document objecting to the Bill of Costs.

Defendants were specifically ordered in the November 15 Order to "submit a statement, including an affidavit with supporting evidence, of costs incurred in responding to said motion"--the Motion for Partial Vacation of Order of June 30, 1993. Defendants have failed to comply. The November 15 Order contemplated the opportunity for plaintiff 's counsel to respond by December 14, 1993, to the claimed costs incurred by defendants in the Motion for Partial Vacation of Order of June 30, 1993. Any such supplemental submission which attempts to include the costs of responding to the motion for partial vacation of the June 30 Order is untimely and specifically ignores a Court Order of a "*required*" (emphasis added) submission and should not be considered by the Court. Defendants did not even attempt to seek an extension of time with respect to the Court ordered, "required" filing. Apart from a response specifically directed to our November 30 submission, and, excepting, of course, any timely motion for reconsideration or the like expressly authorized by the Federal Rules of Civil Procedure and/or the Rules of this Court, no filing should be considered.[3] This is the second time defendants have acted in a manner contrary to, or inconsistent with, this Court's Orders. *See*, our Opposition to Defendants' Request for Further Sanctions at 14.[4]

---

[3] Undersigned counsel will assume that this Court does not wish a further response relating to the Order of November 15; however, if the Court accepts and considers any untimely filing by defendants relating to that matter, counsel requests he be informed and given a reasonable, Due Process opportunity to respond.

[4] It is suggested that it would not be inappropriate for this Court to reconsider its award of sanctions against counsel based on our Opposition to Defendants' Request for Further Sanctions, and particularly Exhibit 2 (attached thereto), and the offer referred to at page 9 of the Opposition. Exhibit 2 was written for Dr. Hooper by undersigned counsel, and at counsel's suggestion. The offer referenced at page 9 was suggested by undersigned counsel. Either or both may dispel the "Court's abiding conviction that this case was pursued by the Plaintiff, with the knowing assistance of his counsel, with a purpose of costing defendants

Respectfully submitted,

/s/ Allen H. Sachsel
ALLEN H. SACHSEL
Counsel for Plaintiff
10521 Judicial Drive
Suite 307
Fairfax, Virginia 22030
(703) 385-9400
Bar No. 09272

CERTIFICATE OF SERVICE

I certify that on December 13, 1993, I caused a copy of the foregoing Statement of Position to be mailed, first class, postage prepaid, to Jeffrey M. Schwaber, Esquire, and David G. Mulquin, Esquire, at their respective addresses of record.

/s/ Allen H. Sachsel
Allen H. Sachsel

---

as much as possible to defend against it" (Mem. and Order of November 29, 1993 at 2).

December 13, 1993

The Honorable Marvin J. Garbis
United States District Court
for the District of Maryland
101 West Lombard Street-Room 740
Baltimore, Maryland 21201

Re: *Hooper* v. *Montgomery Medical Group, P.A., et al.*,

C.A. No. 92-529-MJG

Dear Judge Garbis:

Enclosed are courtesy copies of our Objections to Defendants' Bill of Costs, a Statement of Position, and a Notice of Appeal.

Defendants were specifically directed by your Order of November 15, 1993 to file by November 30, 1993, their claimed costs with respect to their Opposition to our Motion for Partial Vacation of Order of June 30, 1993. They have made no such filing. As stated in the Statement of Position, we believe any untimely filing going to that issue should not be considered because, *inter alia*, we would not have the opportunity to respond that the November 15 Order contemplates. If, however, the Court intends to consider such an untimely filing (and we cannot imagine why the Court should, since the November 15 Order was absolutely clear), we ask that we be notified and given the same opportunity to respond that was provided by the November 15 Order. *See*, our Statement of Position at p. 3, n. 3.

Respectfully,

s/Allen H. Sachsel
Allen H. Sachsel

AHS/ab

Enclosures

cc: Jeffery M. Schwaber, Esquire
David G. Mulquin, Esquire
Clerk

28 U.S.C. 1367 provides, in relevant part:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> * * *
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if --
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

* * *

29 U.S.C. 623(a)(1) provides:

> It shall be unlawful for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

FRCP Rule 11 (pre-12/1/93) provides:

> Every pleading, motion, and other paper of a party represented by an attorney' shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and

that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

FRCP Rule 11 (effective 12/1/93) provides, in relevant part:

(a) SIGNATURE. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) REPRESENTATION TO COURT. By representing to the court (whether by signing, filing, submitting, or later

advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or

parties that have violated subdivision (b) or are responsible for the violation.

(2) NATURE OF SANCTION; LIMITATIONS. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

* * *

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

* * *

FRCP Rule 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to more or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer that all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(3)

No. 95-65

Supreme Court, U.S.
FILED
AUG 16 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

JAMES L. HOOPER, M.D, et al.,

Petitioners,

v.

PERRINO, DOLINSKY, KARESH, WITHROW, JUARBE & BAIER, M.D., P.A., et al.,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Jeffrey M. Schwaber
Stein, Sperling, Bennett, De Jong
Driscoll, Greenfieg & Metro, P.A.
25 West Middle Lane
Rockville, MD. 20850
(301)340-2020

Counsel For Respondent
Perrino, Dolinsky, Karesh,
Withrow, Juarbe & Bair, M.D., P.A.

Albert D. Brault
Brault, Graham, Scott
& Brault
101 South
Washington Street
Rockville, MD. 20850
(301) 424-1060
Counsel for Individual Respondents

PRINTERS: CURRY & TAYLOR (800) 222-8738

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RESTATEMENT OF QUESTIONS PRESENTED

1. Does the decision of the United States Court of Appeals for the Fourth Circuit in *Hooper v. Montgomery Medical Group, P.A., et al.*, Nos. 93-2631, 94-1022, 94-1038, 94-1056, 94-1141, rest on any proposition of law which creates an actual conflict between the United States Circuit Courts of Appeals so as to warrant the exercise by this Court of its jurisdiction by writ of certiorari?

2. Does the decision of the United States Court of Appeals for the Fourth Circuit in *Hooper v. Montgomery Medical Group, P.A., et al.*, Nos. 93-2631, 94-1022, 94-1038, 94-1056, 94-1141, involve any conflicting principals the settlement of which are of importance to the public as distinguished from these particular parties, so as to warrant the exercise by this Court of its jurisdiction by writ of certiorari?

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTIONS PRESENTED. i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES. iii

RESTATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT. 3

The Decision of the United States Court of Appeals for the Fourth Circuit in the Case of *James L. Hooper, M.D. v. Montgomery Medical Group, P.A., et al.*, Nos. 93-2631, 94-1022, 94-1038, 94-1056, 94-1141, Which Petitioners Seek to Review Herein by Certiorari, Rests on No Proposition of Law Which Creates an Actual Conflict Between the United States Circuit Courts of Appeals. It Involves No Conflicting Principals the Settlement of Which is of Importance to the Public As Distinguished From These Particular Parties. Therefore, Jurisdiction in this Court to Review it is Lacking.

CONCLUSION. 17

TABLE OF AUTHORITIES

Page

CASES

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384,110 S. Ct. 2447, 110 L. Ed. 2d (1990) 13

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 58 S. Ct. 849, 82 L.Ed. 1273 (1938). . . 6

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 43 S. Ct. 422, 67 L. Ed. 712 (1923). 10

Magnum Import Co. v. Coty, 262 U.S. 159, 43 S. Ct. 531, 67 L. Ed. 922 (1923). 3,4

National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 71 S. Ct. 453, 95 L. Ed. 479 (1951).11

Parker v. Federal Nat. Mtg. Ass'n, 741 F. 2d 975 (7th Cir. 1984). 9

Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d (1989) 8

Rice v. Sioux City Cemetery, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955). 4,14

Southern Power Company v. North Carolina Public Service Company, 263 U.S. 508, 44 S. Ct. 164, 68 L. Ed. 413 (1924). 6

COURT RULE

Rules of the Supreme Court of the United States
Rule 10. 4,5

Federal Rules of Evidence
Rule 408. 15

No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

JAMES L. HOOPER, M.D., et al.,
Petitioners,

v.

PERRINO, DOLINSKY, KARESH, WITHROW, JUARBE & BAIER, M.D., P.A., et al.,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Perrino, Dolinsky, Karesh, Withrow, Juarbe & Baier, M.D., P.A., et al., hereby oppose the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of *James L. Hooper, M.D. v. Montgomery Medical Group, P.A., et al.*, Nos. 93-2631, 94-1022, 94-1038, 94-1056, 94-1141 (affirmed by unpublished per curiam opinion).

RESTATEMENT OF THE CASE

Petitioner has propounded a statement of facts that Respondents find to be replete with misstatements. In compliance with Rule 15, Respondents are compelled to draw the Court's attention to such misstatements of fact by way of the following supplementation:

MMG was a professional corporation which operated as such (A. 2); the individual Respondents were shareholders in MMG and not "partners"(A. 2 et seq.); Respondents did not promise Dr. Hooper that he would remain President pending the satisfaction of any loan (A. 3); Respondents did not harass Dr. Hooper in any fashion (A. 3); Dr. Hooper waived any objection to Dr. Withrow's election as President of MMG by affirmatively participating in the unanimous vote to elect her (A. 3); Respondents did not agree to Dr. Hooper's unilateral "Leave of Absence" (A. 4, 5); Respondents exercised good faith in their efforts to separate from Dr. Hooper (A. 5); Respondents did not retaliate in any manner against Dr. Hooper for filing a claim with the United States Equal Employment Opportunities Commission (A. 6).

REASONS FOR DENYING THE WRIT

The Decision of the United States Court of Appeals for the Fourth Circuit in the Case of *James L. Hooper, M.D. v. Montgomery Medical Group, P.A., et al.*, Nos. 93-2631, 94-1022, 94-1038, 94-1056, 94-1141, which Petitioners Seek to Review Herein by Certiorari, Rests on No Proposition of Law Which Creates an Actual Conflict Between the United States Circuit Courts of Appeals. It Involves No Conflicting Principals the Settlement of Which is of Importance to the Public As Distinguished From These Particular Parties. Therefore, Jurisdiction in this Court to Review it is Lacking.

The jurisdiction of the Supreme Court of the United States is strictly limited. The questions presented by Petitioners herein fail to assert issues which satisfy either of the jurisdictional elements necessary to support the issuance of a writ of certiorari by this Court.

"The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes; first to secure uniformity of decision between and among those courts, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort." *Magnum Import Co. v Coty*, 262 U.S. 159, 163, 43 S.Ct. 531, 67 L.Ed. 922

(1923). Rule 10 of the Rules of the Supreme Court of the United States provides in pertinent part:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are **special and important reasons** therefor . . ."[1]

In the Petition for Writ of Certiorari, Petitioners James L. Hooper ("Hooper") and his "of counsel," Petitioner Allen H. Sachsel, Esquire ("Sachsel") have completely failed to demonstrate how this Court's review will impact anyone other than the immediate parties to this particular litigation. They have asserted that this Court's review is special and important *to them*. The Supreme Court does not sit for the benefit of particular litigants. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955) (citations omitted). Jurisdiction in this Court is not exercisable merely to give the defeated party in the Circuit Court of Appeals another hearing. *See, Magnum Import Co. v Coty*, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1923).

In determining whether to grant a writ of certiorari, this Court uses the aforestated criteria. Confusion

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[1] The full text of Rule 10 reads as follows:

Rule 10. Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right,

(1 continued) but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's judicial power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court of a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

stemming from glaring conflicts between decisions of the United States Courts of Appeals, or a striking deviation from the acceptable and usual course of judicial proceedings may call the Supreme Court's supervisory power into play. Similarly, the protection of the unity of decisions relating to federal questions is a factor evaluated by this Court in determining whether its jurisdiction is appropriate. Neither issue now posed comes close to satisfying the necessary criteria to warrant this Court's attention.

I. Age Discrimination

In Question I, Hooper has challenged the unwavering assessment of both the District Court and the Fourth Circuit Court of Appeals on the sufficiency of the evidence presented to survive summary judgment. He claims that both courts erred, and that his evidence was sufficient as a matter of law to withstand summary disposition. The Supreme Court has previously stated that the granting of a writ of certiorari would not be warranted merely to review evidence or the inferences drawn from that evidence. *See, General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178, 58 S.Ct. 849, 82 L.Ed. 1273 (1938). As long as the record supports the factual findings of the courts below, the Supreme Court will not disturb such findings. *See, Southern Power Company v. North Carolina Public Service Company*, 263 U.S. 508, 44 S.Ct. 164, 68 L.Ed. 413 (1924) dismissing a writ which initially alleged issues of public importance but

later turned out to be an argument over the sufficiency of evidence.

Hooper continues to discuss facts which the courts below found irrelevant to the alleged discrimination claim.[2] His evidence was presented and re-presented in excruciating detail in both courts below. Specifically, Hooper suggests that he was a victim of disparate treatment by Respondents[3] and was offered "emeritus" status with the Respondent corporation which, if true, apparently somehow suggests age animus. The probative value of these factual allegations was fully considered and discussed by the trial court, and reviewed in detail by the appellate court. Both courts examined Hooper's evidence, examined Respondents' evidence and confirmed that even with every

---

[2] Hooper has not challenged the lower courts' rulings regarding the other causes of action he pursued below. Therefore, only the discrimination claim is addressed herein.

[3] His claim is based on purported medical misconduct by one respondent, which conduct he claims was excused. At no time was Hooper's medical competence at issue. Therefore, the fact that another doctor was not dismissed for unproven allegations of medical misconduct is entirely irrelevant to Hooper's discrimination claim. This finding was confirmed in both courts below (A.1, 19, 32).

reasonable inference resolved in his favor, Hooper lacked sufficient evidence to create a genuine issue of material fact warranting the denial of summary judgment. Hooper's allegations were found to be of no relevance to his discrimination claim. They are of no greater relevance or importance to the public as a whole.

Hooper suggests (albeit in a footnote) that "confusion in and within the circuits" exists regarding the evidentiary value of alleged discriminatory comments in an employment setting.[4] In fact, there exists no confusion between the circuits regarding a plaintiff's obligation to marshall sufficient *relevant* evidence to prosecute his case, especially in a summary proceeding. It is unimportant whether the alleged remark is classified as circumstantial, direct or indirect evidence of discriminatory animus if the remark itself is insufficient to support a cause of action regardless of its label.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), a case cited by Petitioners (Br. 16), this Court recognized that an alleged discriminatory comment may be probative but not dispositive. Notwithstanding the presence of a stray remark, a plaintiff must still produce evidence sufficient to

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[4] *See*, Footnote 27, Petitioners' Brief in Support of a Writ of Certiorari, P.17 (all references to Petitioners' Brief are hereinafter designated "Br. __").

support each and every element of a discrimination action. Hooper failed to do so. For example, he failed to present *any* evidence that he was replaced by a younger person - a required element of his action. As a matter of law, therefore, his case lacked the evidence necessary to permit the case to proceed to trial.

Hooper claims that the courts below have confused a defendant's evidentiary obligation in a discrimination case and by so doing, have somehow jeopardized future litigants.[5] However, the District Court appropriately acknowledged that a defendant's burden is one of production, not persuasion, and that the ultimate burden of persuasion lies squarely with a plaintiff (A. 36 - 37).

Furthermore, in an employment discrimination context, a plaintiff must not only present evidence of a discriminatory motive, but must also be able to prove that adverse employment action resulted from that motive. Even if a prima facie showing is made, all defendants need do is articulate "legitimate nondiscriminatory reasons" for their action. *Parker v. Federal Nat. Mtg. Ass'n.*, 741 F.2d 975, 978 (7th Cir. 1984). Such reasons were articulated in this case. Respondents offered ample evidence to show a nondiscriminatory purpose behind their decision to terminate Hooper. The record is replete with ample

---

[5] Hooper has not explained exactly what importance this alleged "confusion" will have for the public.

evidence of his hostile conduct - conduct which had nothing to do with his age, yet which Respondents found detrimental to the Respondent corporation. When the burden of production shifted back to Hooper, he could provide no additional evidence to rebut Respondents' position. Without some evidence that Respondents' position was pretextual, Hooper had no case. As a result, the trial court determined that there existed no genuine dispute as to any material fact.

Hooper simply failed to meet his burden of persuasion at the summary judgment stage. This failure lacks the requisite importance to confer Supreme Court review. His argument that one stray remark must be evidentially categorized is nothing more than a final attempt to have another court review the same flimsy "facts" he offered at the trial court level. The issue lacks precedential importance, and confers no value to the public at large. Hooper's argument is silent as to how review in this Court will ultimately resolve "some real and embarrassing conflict of opinion and authority" below. *See, Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 43 S.Ct. 422, 67 L.Ed. 712 (1923). As this Court has made clear:

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way . . . In such situations we should "adhere to the usual rule of non-interference" where conclusions of

> Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.

National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951) (citation omitted). Clearly, this Court's "rule of non-interference" is utilized in cases where the record is capable of more than one factual interpretation. In this case, where the record is so thoroughly devoid of factual support for Hooper's claims, and where both courts below used reasonable and "fair-minded" approaches to review and dispose of this vexatious litigation, the jurisdiction of this Court must be denied.

II. Sanctions

In Question 2 A., Sachsel has challenged the District Court's imposition of Rule 11 sanctions against him as well as the Fourth Circuit's affirmance of those sanctions. Sachsel primarily alleges that the Fourth Circuit was "constrained" to review the imposition of sanctions under an abuse of discretion standard and that somehow the review should have been *de novo* (Br. 23).[6] Undaunted

---

[6] The Fourth Circuit Court of Appeals did not review the sanctions issue in a vacuum as Sachsel suggests. Rather, it conducted a *de novo* review of the summary judgment issues. That review provided the Court's foundation to assess the District Court's imposition of sanctions against Sachsel for signing Plaintiff's Opposition

by the repeated findings that his conduct was vexatious and in contravention of Federal Rule 11, and apparently unmoved by the affirmance of those sanctions, Sachsel made these same arguments in a Petition for Rehearing. That Petition was denied (A. 80). He now tries to get this Court to vindicate him. However, Sachsel has failed to allege how Supreme Court review will impact anyone *other* than him. He has also failed to allege any conflict among the circuits on this standard of review.

Sachsel further claims that an impermissible "Catch 22" is created when an "abuse of discretion" standard is used to review the imposition of sanctions. As a result, Sachsel suggests the practice of law itself is seriously compromised.[7] In particular, Sachsel criticizes the abuse of

---

(6 continued) to Defendant's Motion for Summary Judgment ("Opposition"). The Fourth Circuit found no abuse of discretion and affirmed the imposition of sanctions based upon the District Court's rationale.

[7] Sachsel complains that he has been professionally damaged in that he is denied admission to practice in the Supreme Court as a result of being sanctioned under Rule 11. Rule 11 sanctions and the associated consequences are intended to deter improper conduct by an attorney. Unfortunately, in this case, the sanctions imposed have not even slowed the onslaught of litigation generated by Sachsel and Hooper.

discretion standard this Court set in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990), as "illogical" (Br. 24). Sachsel theorizes that had he declined to challenge Respondents' summary judgment motion, he would have been subject to sanctions for failing zealously to represent his client (Br. 24). He misses the point.

A lawyer has a duty not only to his client, but to the Court and to the Bar. He is charged with the protection of the orderly administration of justice. Inherent in these responsibilities is the duty to pursue only those causes which have merit. To that end, a realistic analysis of the merits of a case is essential at every step of the process. Members of the public depend on lawyers for legal direction. Declining to pursue an unsupported or legally meritless matter is as important for a lawyer doing his job as zealously pursuing a supported or meritorious one.

An attorney's signature on a pleading is a good faith certification that an appropriate pre-filing investigation has revealed a meritorious cause of action. Sachsel's arguments in the Opposition lacked the good faith required under Rule 11. In fact, the District Court stated that while Hooper may have had "a glimmer of hope," Sachsel, who *knew* the applicable law, "should have had no realistic hope" (A. 64).

In any event, this issue is inappropriate for review by this Court. The Supreme Court's jurisdictional threshold

of " 'special and important reasons' impl[ies] a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. at 74. As this Court has made clear,

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues.

Id.

Sachsel claims the Fourth Circuit lacked a sufficient record with which to evaluate the District Court's imposition of sanctions. He makes this remarkable claim despite the fact that the record sent to the Fourth Circuit included a 1499 page appendix, replete with "evidence" of the baselessness of the lawsuit. The Fourth Circuit did not need the District Court to spell out in block letters the support for its "abiding conviction" that Sachsel's motives in filing the Opposition were improper. The Opposition itself, replete with arguments wholly inconsistent with existing law and based upon insufficient factual support, was "evidence" enough.

Incredibly, Sachsel suggests that Hooper's offer of settlement was confirmation of the genuine motivation driving the litigation. Respondents had the right to challenge unsupported and unjust accusations and allegations. They had the right to refuse to settle a baseless claim. They had the right (albeit not the desire) to expend

financial resources on their legal defense. They had no desire to reward Hooper or otherwise to condone Sachsel's frivolous pursuit of Hooper's frivolous cause of action. Sachsel's argument is essentially that a lawyer (and his client) can sue a party baselessly, and shield themselves from Rule 11's restrictions on such conduct merely by offering to settle the case for money. This is like a kidnapper saying he should not be charged with a crime because he was willing to release his victim if the ransom had been paid.[8]

In Question II B, Sachsel, in conclusory fashion attacks the District Court's imposition of sanctions for signing the Motion for Partial Vacation of Order of June 30, 1993 ("Motion"). Additionally, he disagrees with the Fourth Circuit's decision to affirm.[9] His primary contention is that Rule 11 does not authorize such a sanction.

Rule 11 specifically states that a pleading must not be "interposed for any improper purpose" (A. 199). Sachsel chose to bring his action in the District Court. He then waited until the action was disposed of *before demanding* the Court decline the very jurisdiction Sachsel invoked when

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[8] Sachsel's entire argument about the settlement discussions is inadmissible, and should be stricken. Rule 408, Federal Rules of Evidence.

[9] Sachsel fails to allege any error by the Fourth Circuit in affirming the District Court sanctions.

he filed the action. The District Court believed (correctly) that Sachsel had "played a game" with the legal system (A. 74). Sachsel's "improper purpose" is clear. The Court of Appeals agreed. Again, no "special or important" reason is given for why the Supreme Court should review the actions of the courts below, with regard to the sanction issue raised by Petitioner in Question II B. A review by the Supreme Court is unwarranted.

CONCLUSION

Petitioners have failed to present any issue sufficient to invoke the jurisdiction of the Supreme Court of the United States. For that reason, and for all of the foregoing reasons, certiorari should be denied.

Respectfully submitted,

Jeffrey M. Schwaber
Stein, Sperling, Bennett, De Jong, Driscoll, Greenfeig & Metro, P.A.
25 West Middle Lane
Rockville, Maryland 20850
(301) 340-2020

Counsel for Respondent
Perrino, Dolinsky, Karesh, Withrow, Juarbe & Baier, M.D., P.A.

Albert D. Brault
Brault, Graham, Scott & Brault
101 South Washington Street
Rockville, Maryland 20850
(301) 424-1060

Counsel for Individual Respondents

No: 95-65

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term 1995

JAMES L. HOOPER, M.D., et al.,
Petitioners,

v.

PERRINO, DOLINSKY, KARESH, WITHROW, JUARBE & BAIER, M.D., P.A., et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Eugene Gressman
Counsel for Petitioners
University of North Carolina School of Law
Chapel Hill, NC 27599-3380
(919) 962-3688

William A. Beeton, Jr.
Counsel of Record for Petitioners
Allen H. Sachsel
Of Counsel for Petitioners
10521 Judicial Drive
Suite 307
Fairfax, VA 22030
(703) 385-9400

LIBERTY LEGAL SERVICES
1111 East Main Street ◆ Richmond, VA 23219 ◆ (804) 643-6054

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CONTENTS

I. The absence of any supporting evidence for the "abiding conviction" on which the Rule 11 Sanctions were based, and which the Fourth Circuit affirmed, raises important Fifth Amendment Due Process questions, and conflicts with decisions of other circuits..... 1

II. The Fourth Circuit's Age Discrimination ruling conflicts with this Court's decision in *Price Waterhouse* and with decisions in other circuits 6

A. The Conflicts..... 6

B. Respondents' Other Erroneous Contentions 8

II. Conclusion..... 10

TABLE OF AUTHORITIES

CASES:

Alphin v. *Sears Roebuck & Co.*,
940 F.2d 1497 (11th Cir. 1991)..... 7

Brailey v. *Campbell*,
832 F.2d 1504 (10th Cir. 1992)..... 4

Brauer Elec. Mfg. Co. v. *Tornado Systems of America*,
687 F.2d 182 (9th Cir. 1982)..... 5

Burns v. *Gadsden State College*,
908 F.2d 1512 (11th Cir. 1990)..... 5

Coltrade Intern., Inc. v. *U.S.*,
973 F.2d 128 (2d Cir. 1992)..... 4

Cooter & Gell v. *Hartmarx Corp.*,
496 U.S. 384 (1990)..... 4, 5

FDIC v. *Calhoun*,
34 F.3d 1291 (5th Cir. 1994)..... 4

Gagne v. *Northwestern Nat. Ins. Co.*,
881 F.2d 309 (6th Cir. 1989)..... 7

Garner v. *Louisiana*,
368 U.S. 157 (1961)..... 1

Iberian Tankers Co. v. *States Const. Corp.*,
388 F.Supp. 1190 (S.D.N.Y.)..... 5

LaPointe v. *UAW*,
8 F.3d 376 (6th Cir. 1993)..... 7

Lewis v. *AT&T Technologies, Inc.*,
619 F.Supp. 915 (D.Md. 1988) 9

McDonnell Douglas Corp. v. *Green*,
411 U.S. 792 (1973)..... 9

Normand v. *Research Institute of America, Inc.*,
927 F.2d 857 (5th Cir. 1991)..... 7

Operating Engineers Pension Trust v. *A-C Co.*,
859 F.2d 1336 (9th Cir. 1988)..... 6

Parker v. *Federal Nat. Mtg. Ass'n*,
741 F.2d 975 (7th Cir. 1974)..... 9

Pierce v. *F.R. Tripler & Co., Inc.*,
770 F.Supp. 118 (S.D.N.Y. 1991)..... 5

Price Waterhouse v. *Hopkins*,
490 U.S. 228 (1989)..... 6, 7, 8

St. Mary's Honor Center v. *Hicks*,
_U.S._, 113 S.Ct. 2742 (1993)..... 8

Texas Dept. of Community Affairs v. *Burdine*,
450 U.S. 278 (1981)..... 8

Thomas v. *Evans*,
880 F.2d 1235 (11th Cir. 1989)..... 4

Thompson v. *City of Louisville*,
362 U.S. 199 (1960)..... 1, 2

CONSTITUTION OF THE UNITED STATES OF AMERICA:

Fifth Amendment 1, 2

RULES:

FRCP Rule 11..... 1, 2, 4, 5, 6

FRE 408..... 5

Precisely because this Court's exercise of certiorari jurisdiction is not "merely to give the defeated party in the Circuit Court of Appeals another hearing" (Br. in Op. at 4), we limited the issues to those having special, important, and broad ranging impact, and with respect to which there is conflict in the circuits.[1] Both the Rule 11 sanctions and the Age Discrimination rulings present such questions. While obviously the issues are of importance to Petitioners, their implications extend will beyond this particular case.

I.

The absence of any supporting evidence for the "abiding conviction" on which the Rule 11 Sanctions were based, and which the Fourth Circuit affirmed, raises important Fifth Amendment Due Process questions, and conflicts with decisions of other circuits.

"[I]t is a violation of due process to convict and punish a man without evidence of his guilt." *Thompson* v. *City of Louisville*, 362 U.S. 199, 206 (1960) (footnote omitted).[2] *To like effect*, *Garner* v. *Louisiana*, 368 U.S. 157, 163 (1961). Thus, there must be some factual basis for imposing sanctions. The Fourth Circuit's affirmance of the district court's orders of Rule 11 sanctions violates Fifth Amendment Due Process requirements. Sanctions were based substantially on an "abiding conviction" of the district judge, unsupported by *any* evidence, that the case was pursued with intent to cost defendants as much as possible to defend.

In our briefs in the court of appeals, at oral argument, and in our Petition for Rehearing, which was denied by a 2 to vote,[3] we asked Respondents to state what evidence

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[1] Contrary to Respondents' implication (Br. in Op. at 7 n.2), we do not concede the correctness of the rulings as to which we have sought certiorari. Their omission is recognition that simply because a ruling is wrong does not make it worthy of review by this Court.

[2] *Thompson* involved fines of $10.00 each, one for loitering, the other for disorderly conduct.

[3] The Petition for Rehearing was directed to the sanctions and

supported the "abiding conviction" of the district judge, for which he had cited nothing. Neither the Fourth Circuit nor Respondents were able to cite any evidence. And, significantly, Respondents are unable to cite even a gossamer, let alone a scintilla, of evidence in this Court to support the "abiding conviction" of the district judge.

While Petitioner Sachsel has not been convicted of a crime,[4] he has suffered both a denial of property and damage to his professional standing and reputation.[5] Both are property rights cognizable and protected by the Fifth Amendment. The implications and consequences flowing from the Fourth Circuit's affirmance of the district court's rulings thus transcend this case. *See also*, Pet. at 25-27. Rule 11 was not intended to operate without regard to Due Process requirements. *See also*, Pet. at 12-14.

The $5,000 sanction was imposed based on the unsupported "abiding conviction" of the district court that this action was prosecuted with the intent of "causing the [Respondents] as much expense and inconvenience as possible in defending this action" (A.64), and that "it is [the district court's] abiding conviction that this case was pursued by [Dr. Hooper], with the knowing assistance of his counsel, with a purpose of costing the [Respondents] as much as possible to defend against it" (A.63).[6]

Age Discrimination issues.

[4] In *Thompson*, the Court observed "that although the fines here are small, the due process questions presented are substantial and we therefore granted certiorari to review the police court's judgments" (362 U.S. at 203).

[5] Sachsel has been admitted to practice since 1963 and never has, prior to this, even been the subject of any disciplinary proceeding. He spent 14 years with U.S. Government agencies, including the Civil Division Appellate Staff of the U.S. Department of Justice. He has prepared and argued cases in nearly every U.S. court of appeals, other Federal and State courts, and the Supreme Court of Virginia. *See also*, A.145 n.1.

[6] The district court also stated that the Age Discrimination claim was "based on the flimsiest of justifications" and was "brought for the

Identical speculation was the basis for the $500 sanction for filing a permissible and proper motion. *See*, Pet. at 27-28. In ordering a response to Respondents' request for sanctions, made as part of their opposition to a perfectly proper motion, the district court stated (A.56), "Plaintiff now wishes to be able to present his breach of fiduciary duty claim all over again in the state court, with a new judge and, presumably a new round of *expensive* proceedings" (emphasis added), and that it would not "allow [Dr. Hooper] to cost Defendants even more in legal fees by litigating the same claim in another court." These statements were made after the district court ordered a response to Respondents' motion seeking $176,000 in sanctions, and only two weeks prior to its order imposing $5,000 in sanctions based on its "abiding conviction" with respect to which it cited no evidentiary support.[7]

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purpose of getting the case into federal court in the first place" (A.63). It cited no evidence to support that statement. There is none.

[7] Respondents did not seek sanctions based on a claim that Dr. Hooper and his counsel needlessly increased the cost of litigation. They did state, inaccurately, that there were a large number of discovery filings *prior* (*see*, Pet. at 25-26) to the filing of the Second Amended Complaint. *See*, A.157. Thus, Petitioners did not have an opportunity to respond to the district court's "abiding conviction" prior to the ruling. We did respond in a later filed Statement of Position. *See*, A.193 n.4. Petitioners also responded to such suggestions previously made by the district court. *See*, A.181-184. The issue was repeatedly addressed by Petitioners in the court of appeals. Petitioners stated in their Main Brief in the court of appeals that "[n]o basis for [the district court's] abiding conviction is given", and that "[t]here is none." In their Reply Brief, Petitioners said:

> The district court cited nothing to support [either its "abiding conviction" or its statement that the "age claim was brought for the purpose of getting into Federal court in the first place"]. Defendants have cited nothing in the record to support the aforementioned statements of the district court. They have cited nothing because there is nothing. There is nothing because the statements are not true. [footnote omitted].

In addition to the Constitutional considerations, Rule 11 sanctions cannot stand if based on a "clearly erroneous assessment of evidence." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1989). A conclusion based on *no* evidence and on speculation is even more "clearly erroneous." *See*, Pet. at 25. Moreover, not to require counsel be informed what he allegedly did wrong defeats an important purpose of Rule 11 -- to deter future violative conduct -- and conflicts with decisions in *FDIC* v. *Calhoun*, 34 F.3d 1291, 1297 (5th Cir. 1994) ("require a *detailed* finding that the proceedings were both 'unreasonable' and 'vexatious'" (emphasis added)); *Coltrade Intern., Inc.* v. *U.S.*, 973 F.2d 128, 131 (2d Cir. 1992) ("Broad findings of frivolous litigation, dilatory tactics, or bad faith are insufficient to support sanctions"); *Thomas* v. *Evans*, 880 F.2d 1235, 1240 (11th Cir. 1989) ("order imposing sanctions should state the *specific* basis . . . to allow for meaningful appellate review" (emphasis in original)); and *Brailey* v. *Campbell*, 832 F.2d 1504, 1513 (10th Cir. 1989) ("If a trial court imposes sanctions, specific findings are required"). *See also*, Pet. at 25-27. As stated in our Petition for Rehearing in the court of appeals:

The Petition for rehearing in the court of appeals, which was denied by a 2 to 1 vote (A.80-81), states, *inter alia:*

> The $5,000 sanction was based in substantial part on the district court's statement that appellant, with the knowing assistance of his counsel, sought to cost defendants as much as possible in the litigation below. This statement is not only unsupported by the Record. It is contrary to the Record . . .
>
> * * *
>
> Furthermore, the premise of the [$500] sanctions was the district court's clearly erroneous conclusion . . . that counsel was continuing a pattern of seeking illegitimately to cost defendants money.

> Counsel feels himself in a Kafkaesque twilight zone. He stands accused of having committed transgressions of conducting this case in a manner designed to cost defendants unreasonable sums, and no one will tell him what he allegedly did to accomplish this end.

Respondents inaccurately state that "Sachsel criticizes the abuse of discretion standard this Court set in *Cooter & Gell* v. *Hartmarx Corp.*" (Br. in Op. at 12-13). The Petition does not challenge or criticize *Cooter & Gell*. What we said is that the court of appeals misinterpreted or misapplied that standard. *Cooter & Gell* clearly states that when Rule 11 sanctions are imposed based on an erroneous view of the law or a clearly erroneous assessment of the evidence, the district court abuses its discretion. *See*, Pet. at 11, 25, and A. 155-157.[8]

Respondents' position would indeed make the practice of law all but impossible, and, consequently, limit access to the courts. Only iron clad cases could safely be pursued, and only absolutely defensible cases could be defended.[9] For fear of arbitrary and substantially unreviewable sanctions, the law

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[8] Respondents' statement (Br. in Op. at 15 n.8) that Dr. Hooper's offers of settlement are inadmissible under FRE Rule 408 as to the sanctions issue is flatly wrong. Settlement and compromise offers are inadmissible only as to the issue of liability. *See, e.g., Brauer Elec. Mfg. Co.* v. *Tornado Systems of America*, 687 F.2d 182, 185 (7th Cir. 1982); *Pierce* v. *F.R. Tripler & Co., Inc.*, 770 F.Supp. 118, 123 (S.D.N.Y. 1991); *Iberian Tankers Co.* v. *States Const. Corp.*, 388 F.Supp. 1190, 1192 (S.D.N.Y. 1975).

Respondents also inaccurately state (Br. in Op. at 14) that we argued "the Fourth Circuit lacked a sufficient record with which to evaluate the District Court's imposition of sanctions." What we said is that the court of appeals stated it examined the reasons given by the district court, and that it did not state it considered the record, or that the record contains support for the trial court's conclusions as to counsel's motivations and conduct (Pet at 26-27).

[9] Anyone who has practiced law or observed the legal process knows that even cases that appear certain can go wrong.

could become static. The charitable hospital immunity doctrine might still stand, and segregation of schools might yet be. Any innovative legal theory would be pursued at counsel's peril for fear a trial judge might find an argument frivolous, a finding that would be required to be affirmed by a reviewing court so long as it did not reverse the lower court on the merits.[10] *See*, *Operating Engineers Pension Trust* v. *A - C Co.*, 859 F.2d 1336, 1344 (9th Cir. 1988).

The Rule 11 issues impact the entire Federal Judicial System, the practice of law generally, and lay citizens' access to the courts.

II.

The Fourth Circuit's Age Discrimination ruling conflicts with this Court's decision in *Price Waterhouse* and with decisions in other circuits.

A. The Conflicts

Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989), makes plain that remarks at work may be evidence of discrimination (remarks that are not "'stray'" remarks can be evidence (450 U.S. at 251 (plurality opinion), and *Id.* at 291, Mr. Justice Kennedy dissenting, indicating that even "'stray remarks'" may prove evidence of discriminatory animus). The Fourth Circuit affirmed a decision that held a remark evidencing age animus, coupled with intent to end Petitioner Hooper's employment[11], followed immediately by harassment, was an isolated comment that was too prejudicial to serve as evidence of discrimination. It did not address two other remarks evidencing age animus, and disparate treatment. This affirmance by the Fourth Circuit is inconsistent with *Price Waterhouse*.

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[10] States have adopted equivalents of Rule 11 and often look to Federal decisions for guidance in interpretation and implementation of those provisions.

[11] Respondents admit "efforts to separate from Dr. Hooper" (Br. in Op. at 2).

The Fourth Circuit's decision also conflicts with the decisions of at least four other circuits. *See, e.g., Normand* v. *Research Institute of America, Inc.*, 927 F.2d 857, 864 (5th Cir. 1991) (statements referring to age, some over a decade before Normond's constructive discharge, supported jury verdict for plaintiff and required reversal of judgment n.o.v., noting at n.3 that cases in which remarks were insufficient to establish age animus *"either* were made by someone who did not participate in the decision to terminate . . ., *or* they were isolated *and* plaintiff's only evidence" (emphases added)); *Alphin* v. *Sears Roebuck & Co.*, 940 F.2d 1497, 1500-1501 (11th Cir. 1991) (remark that "'both of us have been around too long and were too old and making too much money'" circumstantial evidence of age animus precluding summary judgment for defendant); *La Pointe* v. *UAW*, 8 F.3d 376, 379-380 (6th Cir. 1993) (statements of intent to "get older employees out" direct evidence establishing *prima facie* Age Discrimination case and precluding summary judgment); *Burns* v. *Gadsden State College* 908 F.2d 1512, 1518-1519 (11th Cir. 1990) (statements precluded summary judgment and employer can prevail at summary judgment stage *only* if evidence it would have acted the same without proscribed motive "is so strong a reasonable person could" reach only that conclusion).

E*ven the case relied on by the Fourth Circuit (A. 8) does not support its decision. See, Gagne* v. *Northwestern Mut. Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989) (solitary remark at company meeting of need for "'younger blood'" not directed at any individual insufficient).

What constitutes sufficient evidence to withstand a motion for summary judgment in Employment Discrimination cases transcends this particular case. As stated in the Petition at 17, when remarks are admissible evidence of discrimination, and when they are direct evidence, both are critical issues. This decision of the Fourth Circuit, which is inconsistent with the law in other circuits, also emphasizes lower court confusion in such cases. See, Pet. at 17 n.27. That problem is

magnified when, as here, reliance on such evidence forms a basis for Rule 11 sanctions. Moreover, leaving these issues unclarified encourages litigation when it should not be pursued and discourages bringing meritorious claims.[12]

B. Respondents' Other Erroneous Contentions

Respondents state (Br. in Op. at 2) that they did not harass Dr. Hooper. In his affidavit (which was required to be credited) in support of the summary judgment opposition Dr. Hooper detailed harassment by Respondents that began immediately after they "voted [his] old ass out as President" and had "younger blood" running the corporation. He stated (A.139 para. 18) that he "was addressed in a hostile and condescending manner at partner's meetings, was asked to vacate the office [he] occupied for years, was directed to work in a satellite office 20 miles away, was denied keys to the office [he] founded, received sarcastic memoranda, and was denied access to financial information" and that his partners "held what were[,] in effect, secret board meetings from which [he] was excluded." Respondents did not deny any of the above quoted statements. Furthermore, such denials would have been irrelevant for summary judgment purposes.[13]

Respondents make two other legally incorrect statements. They state (Br. in Op. at 9) that Dr. Hooper "failed to present *any* evidence he was replaced by a younger

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[12] Contrary to respondents' contention (Br. in Op. at 9-11), this Court has addressed proof issues in the past because of their broad impact. *See, e.g., Price Waterhouse* v. *Hopkins, supra*; *St. Mary's Honor Center* v. *Hicks*, __ U.S.__, 113 S. Ct. 2742 (1993); *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 278 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

[13] Respondents challenge, in conclusory fashion, a number of other statements in the Petition (Br. in Op. at 2). Except for their statements regarding MMG being a professional corporation, they simply are stating their version of disputed facts and/or legal conclusions. We are puzzled by their statements suggesting we represented MMG to be a partnership rather than a professional corporation since we clearly state in the Petition and in the text at 2 and n.3 that MMG was a professional corporation.

person - a required element of his action" (emphasis in original), and that once they articulated nondiscriminatory reasons for their action, the only way Dr. Hooper could survive summary judgment was to show those reasons pretextual. Both statements are flatly wrong.

In essence, respondents argue that the only way to establish employment discrimination is to satisfy the precise formula of *McDonnell Douglas, supra*. That is incorrect. As stated in *Lewis* v. *AT&T Technologies, Inc.*, 691 F.Supp. 915, 919 (D. Md. 1988), "It is possible to establish a *prima facie* case without satisfying all the *McDonnell Douglas* criteria", since "*McDonnell Douglas* standards [are] not inflexible because the facts necessarily vary in [discrimination] cases." Showing that a proscribed factor motivated an employment decision establishes a case.

To support their contention that once they articulated a nondiscriminatory reason Dr. Hooper could survive summary judgment only by showing pretext, Respondents cite *Parker* v. *Federal Nat. Mtg. Ass'n*, 741 F.2d 975 (7th Cir. 1984). However, *Parker* itself shows Respondents' argument wrong, stating that a plaintiff in an Age Discrimination case "can survive a motion for summary judgment simply by producing circumstantial evidence from which a trier of fact can reasonably infer that age was a determining factor in the employment decision", and that "[o]nce the plaintiff presents the Court with some evidence his employer harbored the discriminatory motive, summary judgment for the defendant is inappropriate because there is a disputed fact material to the case" (*Id.* at 780). *Parker* makes clear that showing pretext is not the sole way to survive summary judgment. Our Petition references such evidence, and shows, that, at a minimum, disputed issues of material fact. Furthermore, there is evidence of pretext since Respondents' reasons are incredible on their face. *See*, Pet. at 8-10, 19-20.

Finally, we note that the district court granted summary judgment improperly by resolving conflicts in the evidence and drawing inferences from the evidence that were

favorable to the moving party when it was required to do the opposite. As the Petition states, Dr. Hooper's evidence consisted of more than one comment. There were three statements from which age animus could be inferred, and there was disparate treatment.[14]

In sum, this issue, like the sanctions, presents both important questions, and conflicting courts of appeals decisions. Resolution by this Court is required.

III.
Conclusion

For the foregoing reasons, and the reasons stated in the Petition, certiorari should be granted.

Respectfully submitted,

Eugene Gressman
Counsel for Petitioners
University of North Carolina
School of Law
Chapel Hill, NC 27599-3380
(919) 962-3688

William A. Beeton, Jr.
Counsel of Record
for Petitioners
Allen H. Sachsel
Of Counsel
for Petitioners
10521 Judicial Drive,
Suite 307
Fairfax, VA 22030
(540) 385-9400

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[14] Respondents' statement that Dr. Hooper based his claim of disparate treatment on "unproven allegations of medical misconduct" (Br. in Op. at 7 n.3) is inaccurate. The conduct of a younger physician which was excused was serious sexual misconduct with a patient, was admitted to Dr. Hooper, was never denied in this litigation by Respondents, and is relevant because it occurred in the same time frame as allegedly improper conduct by Dr. Hooper -- alleged and unproven conduct on which Respondents relied as a reason for terminating Dr. Hooper. *See*, Pet. at 4, 19.